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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~20,707~~ 71-835

VITO GIACALONE,
Petitioner,
vs.
WILLIAM LUCAS, Sheriff of the County of Wayne
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Vito Giacalone, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on July 30, 1971.

OPINIONS BELOW

The opinion of the District Judge is unreported. It is printed as appendix A, *infra*. The opinion of the Court of Appeals is reported as 445 F 2d 1238. It is printed as appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1971, (appendix C, *infra*). A timely petition for rehearing was denied on September 2, 1971 (appendix D, *infra*). On November 29, 1971, Justice Potter Stewart extended the time within which to petition for certiorari to and including December 28, 1971. Jurisdiction is conferred upon this Court by 28 USC § 1254.

QUESTIONS PRESENTED FOR REVIEW

Where, a day and a half before a scheduled trial, the Court is advised that the Defendant's attorney will not be available for trial, is the Defendant denied due process and his right to counsel by being required to proceed to trial with associates of his trial counsel?

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution Amendment VI, provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The United States Constitution Amendment XIV, § 1, provides in part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

This is a habeas corpus proceeding to challenge the petitioner's 1968 conviction of possession of a blackjack, a five year felony under Michigan law. Petitioner has exhausted his State appellate remedies and is presently in custody serving a four year and nine months to five years sentence.

The prosecution arose as a result of a search of petitioner's home following his valid arrest on another charge. A blackjack was found in a dresser drawer in an upstairs bedroom.[1]

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[1] The reasonableness of the search for the blackjack is not urged as a reason for granting the writ of certiorari. Consequently, the details of the search are not set out here. In the event that the petition is granted unlimited as to scope, petitioner will argue that the search was unreasonable even tested by the standards prior to *Chimel v. Calif.*, 395 US 752, (1969).

Following his arrest, petitioner found himself facing three criminal charges, the conspiracy charge for which he was arrested pursuant to a warrant,[2] the blackjack case and possession of guns which had not been presented for safety inspections.[3]

The three cases were assigned to the same trial judge in Detroit. The gun case was tried first, commencing October 31st and ending in a mistrial declared November 12th following the failure of the jury to agree. It had been planned originally that the black jack trial would commence as soon as the gun case terminated. But because the jury for the blackjack case would be selected from a panel which included those who had heard the gun case, a defense motion for change of venue which had been denied was reconsidered. On November 8th, the trial judge announced that the blackjack case would commence on November 14th in Centerville, Michigan, a town about 150 miles from Detroit.[4]

Mr. Joseph W. Louisell, was the attorney for the petitioner.[5] Mr. Louisell suffered from a heart condition which required attention. He had a long-standing[6] ap-

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[2] Petitioner was acquitted of the conspiracy charge after a 6 month jury trial the following year.

[3] A 90 day misdemeanor under Michigan Law. The guns had been discovered in petitioner's home at the time of his arrest.

[4] This was subject to his ruling on a motion to remand the case for a new preliminary hearing. His ruling on that motion did not come until November 12.

[5] Mr. Louisell practiced law in partnership with Mr. Ivan Barris under the name Louisell and Barris. An associate, Mr. Neil Fink had been with the firm since his admission to practice the previous year. The pleadings on behalf of the defendant were signed at various times by Mr. Louisell individually and Mr. Louisell on behalf of the firm, Louisell and Barris.

[6] In this statement, *long-standing* and *protracted*, both have a meaning of approximately 2½ months.

pointment to enter the University Hospital at Ann Arbor for sophisticated cardiovascular diagnostic tests, anticipating his release November 13th. Mr. Louisell assured the judge that he would be available for the blackjack trial commencing November 14th. The trial judge required these assurances because Mr. Louisell was scheduled to commence a protracted[7] trial in Federal Court on November 18th and the trial judge wished the blackjack case tried first.

On November 12th, while the jury was deliberating the gun case, Mr. Fink, an associate of Mr. Louisell, advised the court that Mr. Louisell's doctors in Ann Arbor wanted him to remain for further testing until November 16th.

The trial judge immediately contacted one of the doctors by telephone. He was told that although the further tests were required, there would be no immediate and imminent danger to life if Mr. Louisell were required to try the blackjack case on November 14th.[8] Afterwards, the trial judge announced that he would not adjourn the trial.

> The Court: Mr. Fink, I am going to make this conditional order. You are to be there [in Centerville on November 14th] unless Mr. Louisell is there or Mr. Barris is there to represent Mr. Giacalone with his approval.
>
> Mr. Fink: He won't give an approval to anybody but Mr. Louisell.

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[7] See footnote 6, supra.

[8] Later, the judge talked to a second doctor who indicated that postponement of the tests could involve risks to Mr. Louisell. But the judge discounted this, finding "that there is no serious risk to Mr. Louisell's life or health which would occur if Mr. Louisell were present here to try the case."

Petitioner was then interrogated by the court. This was at about 4:25 P.M. In response to an inquiry by the court, he said:

> Well, your Honor, I would much rather have Mr. Louisell here present, and the only reason I am taking Mr. Fink is because the court has ordered him to, as far as I am concerned.

The court, after a brief intervening colloquy, said to the defendant:

> As I see it, as I see it, Mr. Louisell could be present. As I see it, we have given him and you an opportunity for Mr. Louisell to be your lawyer. Now if he chooses not to avail himself of that opportunity, I shall insist that we go to trial with whatever lawyer you choose, provided that we go, that there be no adjournment and no objection to going to trial. Obviously, Mr. Fink knows a great deal about the case, and in my judgment has represented you very well. But it's for you to decide who will act on your behalf, I just know that I think we have given you a fair opportunity to be represented by Mr. Louisell, the counsel of your choice, on Thursday, at Centerville and I think that's the way it has to go.

A few minutes later, the judge added:

> I am going to seriously consider the use of court process to get Mr. Louisell to be present.

At 4:43 P.M., the cause was adjourned to November 14, 1968, at 8.30 A.M., at the County Court house in St. Joseph County, Centerville, Michigan.

At 8:40 A.M. of November 14th, the trial in Centerville, opened with the following from Mr. Barris:

> Mr. Barris: May I identify myself? My name is Ivan E. Barris, I am a partner of Mr. Joseph

Louisell. Up to yesterday noon, when I settled a trade secret case which I was trying before Judge Fred Ziem, I anticipated I would be in Oakland County rather than here.

As the Court knows, Mr. Giacalone has previously indicated that he retained the services of Mr. Louisell and Mr. Louisell alone. Those remarks, I understand were made in reference to Mr. Fink proceeding. He advises me that the same attitude exists with respect to myself.

• • • •

So we proceed, because your Honor has ordered that we proceed, and obviously we must comply with the court's order. But I would really like to state that on the record, and I would welcome an inquiry, if desired by the court, of Mr. Giacalone, who is present here.

The Court: I assume that you are stating Mr. Giacalone's views?

Mr. Barris: Yes. Right.

The trial proceeded with Mr. Fink and Mr. Barris representing petitioner. The jury found him guilty. After he had exhausted his appellate remedies and surrendered to custody, petitioner initiated these habeas corpus proceedings under 28 USC § 2254.

REASONS FOR GRANTING THE WRIT

The issue in this case relates to the constitutional right of a defendant to the attorney of his choice. The right to a continuance is not at all involved except to the extent that it may be necessary to assure the defendant his right to counsel.

The courts below, in reality, never reached the issue having become lost in a maze of irrelevant considerations. The operative fact is that Mr. Louisell was unavailable; not the reason for his unavailability. The issue would have been sharpened if by analogy it had been suggested to the court that Mr. Louisell was on a ten-day drunk and could not be located.[9]

Also irrelevant is the quality of representation which petitioner received. If this were the issue, appellate courts would be saddled with an onerous if not impossible task in determining the competency of trial counsel forced upon a defendant.

> Appellate courts cannot determine whether the course pursued by an attorney defending a man charged with crime, in respect to the matters referred to, was the best means of promoting his defense. *People vs. Martin,* 210 Mich. 139, 177 NW 193 (1919).

See also, Mishkin, *Foreword: The High Court, The Great Writ and the Due Process of Time and Law.* 79 Harvard Law Review 56, 85, 86 (1965).

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[9] The reasons for Mr. Louisell's absence could become important only if the trial judge decided to take action against him.

> Aside from any a priori judgment that each person is entitled to the actual process of guilt determination which the constitution provides, the fact remains that *post hoc* judgments on cold records are notoriously difficult.

It was on the afternoon of November 12th that petitioner became entitled to a ruling which would protect his constitutional right to an attorney of his choice. What occurred at the trial two days later could neither enlarge nor diminish this right. If petitioner was denied a reasonable opportunity to retain Joe Bfspltk as substitute counsel, his subsequent representation by a latter-day Daniel Webster, Clarence Darrow and William Jennings Bryan rolled into one would not take away the fact that he had been deprived of counsel of his own choosing. (Also irrelevant is the fact that this latter-day wonder was associated with his original counsel and thoroughly familiar with the case).

Upon learning that Mr. Louisell was unavailable, the trial court had only three courses of action which he could follow consistent with the defendant's right to counsel and due process.

> First, he could have proceeded by contempt or a bench warrant to bring Mr. Louisell in for the trial. While this would have been a gross abuse of discretion,[10] it would have raised no constitutional issue for habeas corpus proceedings.

> Secondly, he could have allowed a continuance of two days to allow Mr. Louisell to try the case. It was not

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[10] Mr. Louisell was to start his federal case after completion of the blackjack case. It was expected to take 3 months. Petitioner's 6 month conspiracy trial was to start immediately thereafter. The delay of the diagnostic tests for 8 or more months on a man who had a proven history of heart disease would hardly be a prudent medical decision.

a situation of the trial being adjourned indefinitely because the Federal judge had already agreed that his trial would follow the trial of the blackjack case.

Third, he could have allowed a continuance to afford petitioner an opportunity to obtain substitute counsel of his choice. The length of the continuance would depend upon the circumstances of the case and should take into consideration that the trial was scheduled in a distant town. But 40 hours seems insufficient.

Miranda[11] requires a policeman on the street to give clearer and more certain advice to a suspect of his right to counsel than was given here by a trial judge who had deliberated on the matter for several hours. He vacillated between ordering Mr. Louisell in with a bench warrant and ordering a relatively inexperienced Mr. Fink to try the case.[12]

The Trial Judge's final command was that the case would proceed with either Mr. Fink or Mr. Barris or Mr. Louisell, Appellant was thus confined in his choice of lawyers to two associates of Mr. Louisell. The Court of Appeals noted that "appellant made no attempt to retain another lawyer." While this statement may be technically accurate, it is totally unrealistic and an unfair assessment of the proceedings.[13] It overlooks the fact that

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[11] Miranda v. Arizona, 384 US 436 (1966).

[12] Late in the afternoon of November 12th, he told the defendant "Well, now, I have ordered Mr. Louisell to be here, I mean to be at Centerville [at 8:30 a.m. November 14th]." But he took no steps to enforce that order.

[13] It would be far more accurate to say that whatever efforts petitioner made to retain another lawyer did not appear in the record. The only opportunity appellant had to obtain another lawyer was from about 4:30 Tuesday afternoon until 8:30 Thursday morning when the trial was probably to commence at Centerville.

as late as 4:30 in the afternoon of November 12th, the court had told the defendant that he was considering using court process to bring Mr. Louisell to the trial. It also overlooks the fact that not until after 2:30 on the afternoon of the 13th did the trial judge finally decide whether the trial would be in Centerville or Detroit.

The Court below stated that two continuances had already been granted to petitioner. Not only is this observation irrelevant to an analysis of the issue, it is inaccurate, as Judge McCree demonstrated in his dissenting opinion. There is a theme in the opinion of the court below as well as the lengthy[14] and often bitterly personal opinion of the trial judge denying the motion for new trial, that petitioner and his counsel were constantly seeking delays of the prosecution. This should be answered at least in footnote.[15]

Having thus delineated the issue as clearly as possible, we turn to whether there is a need for this court to devote its attention to it. The tremendous rise in the case load of the various courts has created problems which were un-

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[14] The opinion ran to over 100 pages as printed in our appendix in the Court of Appeals.

[15] Petitioner was arraigned in Circuit Court on August 1, 1968. On September 23rd a notice of trial for October 8 and assignment of trial judge was made. Within 4 days the various defense motions to suppress evidence, quash the information, etc., were filed and noticed for hearing October 4th. Not until October 4th did the People file an answer to the several defense motions and at that time they orally requested an adjournment of the trial (petitioner had already moved for such an adjournment because there was insufficient time available to dispose of the defense motions). An evidentiary hearing was required on the motion to suppress evidence. The motion was denied on October 31, following 6 days of testimony and argument. On the same day the court commenced selection of a jury for trial of the gun case. In setting the blackjack case to follow, the trial court had already been advised of Mr. Louisell's long-standing (see footnote 6, supra) arrangements for hospitalization.

foreseen 30 years ago. Michigan, along with many other States, in an attempt to cope with the increased litigation has, within the past decade, created a new trial court and an intermediate appellate court. The conflicting demands of the various courts upon the time of a trial lawyer do create problems not only for the courts but for the litigant caught in the cross-fire. Efficient administration of court dockets should not be attained at the expense of the litigant's rights. As the Chief Justice of the United States noted in his first State of the Judiciary message:

> [We have made a] deliberate commitment to values higher than pure efficiency when we are dealing with human liberty.

This court has spoken extensively on the right of an indigent to an attorney and on the right of a suspect to an attorney at the initial stages of criminal prosecution. The constitutional principles are clearly defined in these areas. But the court has had little occasion to speak on the issue which we present.

Ungar v. Sarafite, 376 US 575 (1964) is not really in point. Ungar was an attorney who was cited for contempt in proceedings which at least arguably were summary in nature. He was given 5 days notice of his trial and made no request for an adjournment until the day set for trial. That case hardly gives guidelines for the usual criminal case where the defendant is a layman and the unavailability of chosen counsel is brought to the attention of the court as soon as possible. *Chandler v. Fretag,* 348 US 3 (1954) and *Reynolds v. Cochran,* 365 US 525 (1961) are closer in point, although the denial of a continuance caused a total lack of representation in those cases. Is there a constitutional difference between no representation and unwanted representation?

That the lower courts need guidelines is evident from an examination of the cases. For lack of an authority more in point, *Ungar* is often cited inappropriately. In the court below, there was a split decision, Judge McCree having filed an extensive dissenting opinion. A similar fact situation divided a Seventh Circuit panel in *Williams v. United States,* 332 F 2d 36 (1964). The decision below is in conflict with a prior decision of the Sixth Circuit by another panel. *United States v. Johnston,* 318 F 2d 288 (1963). See also *United States v. Knight,* 443 F 2d 174 (CA 6, 1971), a 2-1 decision.

The decision below conflicts with *Lee v. United States,* 235 F 2d 219 (1956), a District of Columbia decision upsetting a conviction because the trial judge ordered the defendant to trial with an attorney he had expressly rejected.

> But appellant bore no responsibility for being without counsel on the eve of his trial. He had appeared for trial with counsel of his own choosing, and the record does not show that he had anything to do with that counsel's withdrawal by leave of court . . . Assuming that a trial court has discretion in the matter of how much opportunity is to be afforded the accused for selecting counsel, we think it would abuse that discretion by refusing to continue the trial over a week-end for that purpose unless it clearly appeared that the accused would not find counsel of his own choosing. *id,* 235 F 2d 221.

See also *Releford v. United States,* 288 F 2d 298 (CA 9, 1961); *Rastrom v. Robbins,* 440 F 2d 1251 (CA 1, 1971).

Finally, we note the assertions that petitioner was not prejudiced by the denial of his right to counsel of his choice. That argument should carry little weight in this court's decision as to whether to grant certiorari, what-

ever the court may feel in deciding the case on its merits. Cf. *Glasser v. United States*, 315 US 60, 76 (1942)

> The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising out of its denial.

If the record comes to this Court, we will demonstrate the probability of prejudice whatever our burden may be.

CONCLUSION AND RELIEF REQUESTED

This petition tenders to the court a narrow but nonetheless important issue which has not heretofore been decided. The decisions of the Courts of Appeals of the United States are divided not only in result but rationale. An analysis of State court decisions would disclose even greater confusion. For the reasons stated herein, the court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX A

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

(United States District Court)

(Filed July 2, 1970)

(Vito Giacalone v. William Lucas)

At a session of said court, held in the Federal Building in the City of Detroit, Michigan, on July 2, 1970.

Present: The Honorable Fred W. Kaess, United States District Judge.

Petitioner was convicted of the crime of possessing a blackjack, in violation of M.C.L.A. §750.224 (M.S.A. 1962 §28.421), and was sentenced to four years, nine months, to five years' imprisonment. The following allegations are made: (1) petitioner's constitutional rights against illegal search and seizure have been violated; (2) his constitutional right to counsel of his choice has been violated; (3) the trial judge was prejudiced against him, causing him to be denied his constitutional rights and due process of law; (4) his constitutional rights against self-incrimination were violated when the trial judge refused to charge the jury with a certain part of the defense-proffered request; (5) his constitutional rights were violated by the sentencing procedure used by the trial court; and (6) his right to due process of law was denied him by the application of M.C.L.A. §750.225 (M.S.A. 1962 §28.4241), and that said statute as applied to him violated his right of privacy.

The first issue has to do with the search and seizure which occurred at the time of the arrest.

On May 14, 1968, at approximately 6:00 A.M., petitioner was arrested pursuant to an arrest warrant charging him with conspiracy to commit extortion. Nine law enforcement officers representing four different agencies were present. Petitioner was dressed in a pair of shorty pajamas, a pair of slippers, and a robe, and a prosthesis was attached to his leg. Petitioner contends that he was *ordered* to go to his bedroom to change clothes. While they were in the bedroom Mr. Giacalone indicated that he was going to get some clothes out of a chest of drawers. He was stopped by one of the officers, who searched the drawers and found the blackjack.

After a hearing on a motion to suppress the evidence, which lasted six days, the trial Court found that it was *suggested* that he go to his bedroom in order to change into street clothes and that Mr. Giacalone accepted the suggestion without "any sense of duress or compulsion." The trial judge also found that the State Police, working with the Detroit Police and the Attorney General's office had "carried on an investigation of an alleged conspiracy to extort," and that the investigating officers "became satisfied that there was probable cause to believe that Vito Giacalone was a participant in this conspiracy." See Revised Opinion On Motions To Suppress Evidence, *People v. Giacalone*, Criminal Nos. 46838, 47086 (Wayne County Circuit Court Nov. 13, 1968). The findings of fact made by the trial judge are presumed to be correct. 28 U.S.C. §2254 (d).

The Fourth Amendment provides that a person shall be free from "unreasonable searches and seizures." The presence of four different enforcement agencies beclouds the issue of whether or not the arrest was made in good faith. However the record reveals that the arrest warrant was

executed in good faith and that it was not used as a subterfuge to make an otherwise impermissible search. *Jones v. United States*, 357 U.S. 493 (1958). An extensive investigation was conducted prior to the arrest and the officers believed that there was probable cause to believe that Mr. Giacalone was involved in the conspiracy. Mr. Giacalone was tried on the conspiracy charge and after a seven-month trial was acquitted. The Court also notes that all the officers present at the time of the arrest were acting under the direction of the Michigan State Police.

This leaves the question of whether or not the search was reasonable. In *Agnello v. United States*, 269 U.S. 20 (1925), the Supreme Court stated that:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted." 269 U.S. at 30.

In *Harris v. United States*, 331 U.S. 145 (1947), the Court noted that:

> "The opinions of this Court have clearly recognized that search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control . . . Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested."
>
> 331 U.S. 151-152.

In *United States v. Rabinowitz,* 339 U.S. 56 (1950), the Supreme Court stated that:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and seizures and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."
>
> 339 U.S. at 63

The case of *Chimel v. California,* 395 U.S. 752 (1969), cited by counsel for petitioner, need not be considered as it has been held to be not retroactive. *Turner v. United States,* No. 19669 (6th Cir. May 7, 1970).

The Court finds that the search was reasonable for the following reasons: (1) petitioner was arrested pursuant to a valid arrest warrant, the warrant not being used as a subterfuge to enable the officers to search petitioner and his home; (2) petitioner was not *ordered* to go to his bedroom to change clothes; (3) the search was incident to such lawful arrest; (4) the dresser drawer was under the control of petitioner; and (5) petitioner had been arrested on a charge of conspiring to exort and it was reasonable for the police officer to search the dresser drawer in order to protect himself and the other officers.

Petitioner's second allegation is that his constitutional right to counsel of his choice was violated when he was forced to proceed with trial without the services of his retained attorney, Mr. Joseph Louisell. The factual allegations of the petitioner are admitted by the respondent. During June and July Mr. Louisell had occasion to visit socially with a heart specialist affiliated with the Univer-

sity Hospital in Ann Arbor. Mr. Louisell has a history of heart trouble and it was suggested by the doctor that he make an appointment to see him. On September 2, 1968 the appointment was confirmed for Sunday, November 10, 1968. On November 7 Mr. Louisell, knowing that he was scheduled for the appointment in Ann Arbor on the 10th, agreed to a trial date of November 14. Mr. Louisell had estimated that he would be out of the hospital by the 13th, and this was considered when the trial date was set. On November 12 Mr. Fink, an associate of Mr. Louisell, came to court seeking an adjournment so that Mr. Louisell might remain in Ann Arbor for further diagnostic tests. No medical certificate or affidavit of any type was presented to the Court. The Court refused to adjourn the trial. The trial judge talked to the doctor on more than one occasion and was informed that it could not be said that Mr. Louisell's life was in danger, but that it was strongly recommended that he remain in the hospital to complete the tests.

Mr. Louisell had a case which was scheduled to begin on Monday, November 18, 1968, before Judge Keith of this court, which case was expected to last for some time. Judge Keith was willing to put off his case for a day or two and the trial judge was made aware of this. An alternative trial date was proposed by Mr. Louisell or Mr. Fink. The case was tried by Messrs. Fink and Barris of Mr. Louisell's office. The trial lasted only one day, and Mr. Louisell was working on November 17, the day after he left the hospital. An evidentiary hearing at the trial court level on this matter was not requested until after the trial had been completed. The request was denied.

The law is clear that a person must have a "fair opportunity to secure counsel of his choice." *Powell v. Alabama,* 287 U.S. 45 (1932); *Chandler v. Fretag,* 348 U.S. 3 (1954); *Crooker v. State of California,* 357 U.S. 433 (1958). The

law also stated that one's right to choose his own counsel "cannot be insisted on in such a manner as will obstruct the orderly disposition of the business of the courts" and that "where the inability of retained counsel to serve gives promise of unreasonable delay or inconvenience in completing the trial, the Court may require the defendant to secure other counsel." *United States v. Bentvena,* 319 F.2d 916, 925 (2nd Cir., 1963); *Releford v. United States,* 288 F.2d 298 (9th Cir., 1961).

The question before this court is not what action would have been taken here, but whether or not the trial judge denied petitioner a fair opportunity to have counsel of his choice. Any court, whether it be a state court or a federal court, has a difficult time in keeping its docket up to date and in an orderly fashion. Similarly, a renowned attorney may find it difficult to expeditiously handle his case load, due to the volume of cases he has undertaken. When a court is faced with the problem of whether or not a particular case will be tried within a reasonable time due to the unavailability of counsel, the court may in its discretion require that alternate counsel be sought. At some point the scheduling of cases ceases to be for the convenience of counsel. A court has the right to act within its discretionary power and see to it that a defendant is brought to trial.

In the instant case the trial date had been set in an attempt to make it convenience for all parties. The tests which Mr. Louisell was undergoing were of a non-emergency nature and were for diagnostic purposes only. Mr. Louisell was aware that if he chose to remain in the hospital that he would be unable to try the case. Mr. Louisell's life was not in danger, as indicated by the fact that he waited two months for the appointment. Petitioner stated that he preferred Mr. Louisell, but he expressed no

dissatisfaction with Mr. Fink or Mr. Barris, both of whom had taken an active part in the preliminary matters of this case and other cases involving petitioner. See *United States v. Johnston and Balk,* 318 F.2d 288 (1963). In view of the circumstances this court find that the trial judge did not abuse his discretion and that there is no relief available on this point.

Petitioner's next allegation is that the trial judge was prejudiced, causing him to be denied his constitutional rights and due process of law. The respondent argues that petitioner has not exhausted the available state remedies on this question. 28 U.S.C. §2254. In support of its position, the respondent points out that the question was not presented to the trial court and thus was not properly reviewable by the Michigan Court of Appeals. *People v. Semchena,* 7 M.A. 302 (1967). The Michigan Court of Appeals did rule on this question in considering an application for a rehearing, but the order denying the application is not clear as to whether the application was denied because this question had not been presented to the trial court or whether it was denied on the merits.

Petitioner contends that a reading of the opinion of the trial judge cancelling bond after the conviction, the opinion at the time of sentencing, and the opinion on the motion for a new trial, supports this allegation of prejudice. Petitioner submits that the trial judge was a "man with a cause", and that the "cause" related to petitioner's background. Counsel argues that the trial judge was prejudiced from the outset, and that the State of Michigan offers no procedural remedy on this issue.

This court does not doubt that in many instances opinions may be formed, especially where the individual involved does have a reputation. However a trial judge can,

and it is presumed that he does, divorce his opinions from his handling of the proceedings.

In the instant case it is clear that the trial judge was not pleased with Mr. Louisell's activities, as he indicated that it was his opinion that Mr. Louisell was not acting in "good faith" regarding his unavailability for trial. The trial court's opinions also indicate an awareness of petitioner's reputation in the community. However, a reading of the record does not disclose that his dissatisfaction with Mr. Louisell or his knowledge of the petitioner's reputation resulted in the deprivation of the petitioner's constitutional rights or a denial of due process of law. For it is to be borne in mind that the petitioner was convicted by a jury, and a review of the record discloses no prejudice in the trial judge nor does it disclose that the court attempted to persuade the jury either directly or indirectly to return a guilty verdict. (The question regarding the sentencing procedure is fully discussed later.)

Thus having considered the arguments presented and having thoroughly reviewed the record, this court finds the allegation of prejudice to be without merit. The court further finds that an evidentiary hearing on this point would only serve to repeat the arguments herein considered.

Petitioner's next allegation is that his constitutional rights against self-incrimination were violated when the trial judge refused to give the following defense-proffered request to charge:

> "Mr. Giacalone has seen fit not to take the stand as a witness in his own defense, which is his constitutional right to observe. I instruct you that under your oath as jurors you may not and cannot comment in any way in the course of your deliberations upon his exercise of this constitutional right. And I further instruct

you that under your oath as jurors you may not and cannot in any way infer guilt by reason of his exercise of his constitutional right. The reason for this is that our law recognizes that an entirely innocent person for a multitude of valid reasons, might see fit not to testify in his own behalf. By way of example, excessive timidity or nervousness, when facing others and attempting to explain transactions of suspicious character and offenses charged against him will often confuse and embarrass even an innocent person to such a degree as to increase rather than to remove prejudice against him. It is not everyone, however honest, who could therefore willingly be placed on the witness stand. Who would willingly therefore be placed on the witness stand."

The trial judge's instruction was as follows:

"Under our law, a defendant may take the witness stand and testify in his own behalf or he may remain off the witness stand, as he sees fit. He has this right to remain off the witness stand or to take it, as he sees fit. If he does not take the witness stand, you are not to draw any inferences, unfavorable to him, from his failure to testify."

"Habeas corpus is not available to set aside a conviction on the basis of erroneous jury instructions unless the error has such an effect upon the trial as to render it so fundamentally unfair that it constitutes the denial of a fair trial in the constitutional sense." *Linebarger v. State of Oklahoma,* 404 F. 2d 1092 (10th Cir., 1968); cert. denied 394 U.S. 938. The charge given by the trial judge was fair and did not cause petitioner to be denied his constitutional right against self-incrimination. We agree with the Michi-

gan Court of Appeals that there was no error. *People v. Giacalone*, No. 6971 (M.A. 1970) ... M.A. .... (1970).

Petitioner questions the sentencing procedure, claiming that his constitutional rights were violated because (1) he did not have an opportunity to cross-examine the witnesses against him; (2) he was not given notice "of what the Court would take into consideration and thus was deprived of contesting hearsay information given to the Court," and (3) the Court took into consideration prior arrests which did not end up in convictions.

Petitioner further contends that his sereve sentence "was predicated on the notion that petitioner was a member of a large-scale criminal organization:" and "that this false assumption was derived in great part by unconstitutional means, to wit: illegal electronic surveillance." At the time of sentencing the trial judge indicated that he considered testimony taken at hearings held by the United States Senate and the Canadian Royal Commission on Crime in Toronto, Canada. The trial judge also explained what other factors were considered.

The Supreme Court has stated that:

> ". . . once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out of court' information relative to the circumstances of the crime and to the convicted person's life and characteristics."

Williams v. Oklahoma, 358 U.S. 576, 584.

The Court finds nothing improper in the sentencing procedure.

Petitioner's final allegation is that "his constitutional rights were violated and that due process of law as guaranteed by the Fourteenth Amendment was denied him by the application to him of M.S.A. 28.421 and that said statute as applied violated his right of privacy implicit in the due process clause of the Fourteenth Amendment". The court has considered this allegation and finds it to be without merit. See *People v. Brown*, 253 Mich. 537 (1931); *Miller v. Texas*, 153 U.S. 535 (1894).

As a final thought, the court notes that habeas corpus proceedings are not designed to substitute the Federal District Court's judgment for that of the State Courts, regarding the wisdom of instituting lawful criminal proceedings by the State enforcement officials or for the severity of a sentence within legislative limits. See 28 U.S.C.A. 2254(a).

Therefore, It is Ordered that the Petition for Writ of Habeas Corpus is hereby Denied.

Fred W. Kaess
United States District Judge

APPENDIX B

No. 20,707

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

Vito Giacalone, *Petitioner-Appellant,* v. William Lucas, Sheriff, *Respondent-Appellee*	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed July 30, 1971.

Before PHILLIPS, Chief Judge, and CELEBREEZE and McCREE, Circuit Judges.

CELEBREZZE, Circuit Judge.

This appeal is of an order of the United States District Court for the Eastern District of Michigan dismissing, without a hearing, the Appellant's petition for writ of habeas corpus. The petition arises out of Appellant's conviction, by a jury, for unlawful possession of a blackjack, Mich.Stat.Ann. § 28.421, M.C.L.A. § 750.224 (1960), and the imposition of a four year nine-month to five-year prison sentence upon him. During and after his trial, the Appellant raised the following issues, *inter alia:* first, whether the state trial judge's refusal to grant the Appellant a continuance until his chief counsel was released from the hospital, where he was undergoing diagnostic tests, deprived the Appellant of due process of law; second, whether the search of the Appellant's home, incident to his arrest, which resulted in the discovery and seizure of the blackjack, was unreasonable. These issues were treated in a scholarly, 100-page series of unreported opinions by the

trial judge, Honorable Victor J. Baum; they were considered by the Michigan Court of Appeals, which affirmed the Appellant's conviction, People v. Giacalone, 23 Mich. App. 163, 178 N.W.2d 162 (1970); and by the Michigan Supreme Court, 383 Mich. 786 (1970), which denied the Appellant's motion for leave to appeal, two justices dissenting. Having exhausted his state remedies, the Appellant sought habeas corpus in the District Court. Having lost there, he appeals to this Court. We affirm.

I.

[1] A motion by a criminal defendant for a continuance of the trial until his retained counsel can be present is directed to the sound discretion of the trial court. Ungar v. Sarafite, 376 U.S. 575, 589-590, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); Kobey v. United States, 208 F.2d 583, 592-594 (9th Cir. 1953); United States v. Arlen, 252 F.2d 491 (2d Cir. 1958). Cf. Callahan v. Russell, 423 F.2d 450, 454-456 (6th Cir. 1970); United States v. Knight, 443 F.2d 174 (6th Cir. 1971).

[2-5] Proper exercise of this discretion requires a delicate balance between the defendant's right to adequate representation of counsel at trial, and the public interest in the prompt and efficient administration of justice. On the one hand, a court may not insist upon expeditiousness for its own sake, but, on the other, a defendant cannot be allowed to insist upon unreasonable delay or inconvenience in the completion of his trial. What is a reasonable delay varies depending upon all the surrounding facts and circumstances. Williams v. United States, 332 F.2d 36 (7th Cir. 1964), cert. denied, 379 U.S. 976, 85 S. Ct. 672, 13 L.Ed. 2d 566; Mende v. United States, 282 F.2d 881 (9th Cir. 1960), cert. denied, 364 U.S. 933, 81 S.Ct. 379, 5 L.Ed.2d 365, reh. denied, 365 U.S. 825, 81 S.St. 689, 5 L.Ed.2d 704; Relerford

v. United States, 309 F.2d 706, 708 (9th Cir. 1962); Relerford v. United States, 288 F.2d 298, 301-302 (9th Cir. 1961); Lee v. United States, 98 U.S.App.D.C. 272, 235 F. 2d 219, 221 (1956); Shores v. United States, 80 F.2d 942 (9th Cir. 1936), cert. denied, 297 U.S. 705, 56 S.Ct. 501, 80 L.Ed.993; Lias v. United States, 51 F.2d 215 (4th Cir. 1931), aff'd per curiam, 284 U.S. 584, 52 S.Ct. 128, 76 L.Ed. 505; Hardie v. United States, 22F.2d 803 (5th Cir. 1927), cert. denied, 276 U.S. 636, 48 S.Ct. 421, 72 L.Ed. 744. Some of the factors to be considered in the determination of reasonableness are: the length of the delay requested; whether the lead counsel has associates prepared to try the case in his absence; whether other continuances have been requested and received; the convenience or inconvenience to litigants, witnesses, opposing counsel, and the court; whether the delay seems to be for legitimate reasons, or whether it is purposeful and dilatory; and other relevant factors. Considering the totality of circumstances in the instant case, we believe that the trial judge's refusal to grant a continuance until the Appellant's chief counsel, Mr. Joseph W. Louisell, left the hospital where he was undergoing diagnostic tests for a heart condition, was proper, and that it did not infringe upon the Appellant's constitutional rights.

The Appellant was arrested on May 14, 1968 and charged with the unlawful possession of a blackjack. The case was docketed before the Michigan Circuit Court for trial on October 14, 1968, however, the trial judge granted a defense request for a continuance until October 21, 1968, in order that Mr. Louisell have an opportunity to prepare and argue another case that week. One other continuance for the convenience of defense counsel was granted by the trial court before the case ultimately came to trial.

At the time the Appellant was arrested and charged with possession of the blackjack, he was also charged with two other felonies. The task of docketing these three cases for trials at times when Mr. Louisell would be available proved to be a formidable one. For one reason, Mr. Louisell suffered from a heart conditon, which required attention. On September 2, 1968, Mr. Louisell completed arrangements to enter the Ann Arbor, Michigan hospital for certain non-emergency, diagnostic tests on Sunday, November 10, 1968. Compounding the problem further was the fact that Mr. Louisell had a very heavy caseload. In particular, Mr. Louisell was defense counsel in a criminal case in the federal court in Detroit, which was to be tried in November. The district judge to whom the federal case had been assigned anticipated that it would be a protracted affair, with over two hundred witnesses.

After some delicate negotiations, an agreement was reached between Mr. Louisell, the trial judge, and the district judge, under which the four cases in which Mr. Louisell was defense counsel could be heard within a reasonable time, and without interfering with each other or with Mr. Louisell's appointment in Ann Arbor, Michigan. Under the agreement, to which Mr. Louisell gave complete assent, the Appellant would be tried on the first of his charges in early November, then tried on the blackjack charge on Thursday, November 14, 1968, then tried on the third charge *after* the federal case in which Mr. Louisell was defense counsel was completed. Under the agreement, the trial in the federal court was to begin on Monday, November 18, 1968. Mr. Louisell gave his assent to the agreement on November 7, 1968. According to the trial judge, Mr. Louisell assured the court that his tests would be prepared to try the blackjack case on November 14.

Mr. Louisell practices in the firm of Louisell and Barris, with two other lawyers. Mr. Ivan E. Barris, his partner, and Mr. Neil H. Fink, his associate, collaborated, according to the undisputed findings of the trial court, on all the cases in which the Appellant was involved. Mr. Fink and Mr. Barris shared the responsibilities of examination of witnesses and arguing to the jury with Mr. Louisell. According to the trial court, the three worked as a team. As for the ability of the three lawyers, the trial court stated:

> "The three lawyers are indeed remarkable men. All three are excellent advocates. Each is an outstanding craftsman of the law. Each is gifted in establishing and maintaining rapport with juries. Each is talented in eliciting direct testimony. Each is brilliant in cross-examination. Each is superb is arguing to juries. Each is a master in arguing law to judges. Each is capable of giving the defendant an outstanding defense."

From the record, it is undisputed that all three lawyers were familiar with, and prepared to try, the blackjack case on November 14, 1968.

On Tuesday, November 12, 1968, Mr. Fink informed the trial judge that Mr. Louisell's tests would last longer than they had previously anticipated, and that Mr. Louisell would not be available for trial on Thursday, November 14, 1968, when the blackjack case was scheduled. Mr. Fink requested a continuance in order that Mr. Louisell be able to remain in the hospital and still try the case. When asked how long a continuance would be necessary, Mr. Fink was unable to say. No medical certificate or affidavit was presented to the trial court. The trial judge spoke on more than one occasion with Mr. Louisell's doctor in Ann Arbor, and was informed that Mr. Louisell's life was not

in danger, but that it was recommended that he remain in the hospital to complete the tests. Mr. Fink reminded the trial court that although the federal case had been scheduled for November 18, the district court had expressed a willingness to begin the trial a few days later, if necessary; and he stated that the blackjack case would not take more than a day to try. Nevertheless, the trial court denied the continuance compelling the Appellant to trial with Messrs. Barris and Fink as his attorneys. The Appellant did make oral protests that he wanted Mr. Louisell as his counsel, but, when informed of the denial of the continuance, made no objection whatsoever to being represented by Messrs. Barris and Fink, and made no attempt to obtain other counsel.

The Appellant was tried and convicted. There is no contention that Messrs. Barris and Fink did not perform well, or that the Appellant's trial itself was anything other than a model of fairness.

Nevertheless, the Appellant continued to object to the denial of the continuance. On November 29, 1968, he filed a motion for a new trial, reciting the denial of a continuance as one of the grounds. No affidavit was filed and no sworn testimony was proffered regarding Mr. Louisell's unavailability, or regarding any danger to Mr. Louisell's life or health if he had appeared for the trial of the blackjack case. On December 6, 1968, an oral argument was made on the motion. During the oral argument, neither affidavit nor sworn testimony was proffered, nor did the Appellant move orally or in writing to supplement the record, even when told he could do so. On December 9, 1968, a supplemental motion for a new trial was filed, and four days later a hearing took place. Neither in the motion nor at the hearing was there any sworn testimony proffered or presented.

Only on January 31, 1969, did the Appellant file a "Motion For Order Granting Evidentiary Hearing," in which he requested an evidentiary hearing and proffered testimony regarding Mr. Louisell's unavailability. The trial court had held that the time for such a motion had expired, and denied it. [The trial court's opinion denying said motion is attached as "Appendix A".]

The Appellant cites United States v. Johnston, 318 F.2d 288 (6th Cir. 1963) as precedent in his argument that the trial judge in the instant case abused his discretion in refusing the continuance. In *Johnston*, the defendant was charged with mail fraud and wire fraud, and with conspiracy to commit each offense. He was also represented by Mr. Louisell who, on the date of the trial, appeared in court with Mr. Barris, and informed the court that because of an "imperative commitment" to argue a case before the Supreme Court of Michigan, he would be unable to try the defendant's case. He informed the court, however, that Mr. Barris had collaborated with him in every case he had handled for eight years, and that since Mr. Barris had participated in the pre-trial phase of the case and was conversant with the indictment, he would be able to try the case in Mr. Louisell's stead. The defendant objected to this arrangement, said he had confidence in Mr. Louisell but did not know Mr. Barris, and requested time to retain a lawyer he had confidence in. The District Court denied the request, forcing the defendant to go to trial with Mr. Barris. Our Court reversed, holding that the District Court erred in not allowing the defendant a fair opportunity and reasonable time to employ counsel of his own choosing.

The *Johnston* case is distinguishable in several critical respects from the instant case. First, the defendant had made vigorous efforts to obtain another lawyer after Mr.

Louisell abandoned him. His efforts were in vain. In the instant case, the Appellant made no attempt to retain another lawyer. Second, in the *Johnston* case, the trial court had no reason to believe the delay would be a long one; whereas, in the instant case, the Appellant's request was virtually open-ended. The court was given no assurance that Mr. Louisell would be prepared to try the black-jack case before the federal case began, and, if he was not, the delay could have been as much as one-third of a year. In the *Johnston* case, the defendant stated he had no confidence in Mr. Barris. In the instant case, the Appellant stated he preferred Mr. Louisell, but made no objection to the representation of Messrs. Barris and Fink. *Johnston* does not indicate whether the defendant had asked for or received prior continuances. In the instant case, the Appellant had had two. In *Johnston*, the reasons why counsel would be unavailable were stated in open court. In the instant case, no documentation was ever made of the reasons why Mr. Louisell would be unable to attend.

> "The matter of continuance is traditionally within the discretion of the trial judge. * * * There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, *particularly in the reasons presented to the trial judge at the time the request is denied.*" Ungar v. Sarafite, *supra*, 376 U.S. at 589, 84 S.Ct. at 849 (emphasis added.)

Mr. Louisell's failure to provide the appropriate documentation at the time the request was made evidenced, at least, a cavalier disregard for the process of the court and the rights of his client. We need not consider the trial court's finding that it was part of a concerted scheme to perpetuate a fraud upon the court and system of justice.

In smmary, we do not believe the trial judge's denial of a continuance was an abuse of discretion for the following reasons: Mr. Louisell was in the hospital voluntarily, for a nonemergency checkup; associate counsel were available and prepared to try the case; the request for delay was open ended—it could have been four months or more before Mr. Louisell would again become available for trial of the case; the request for a continuance was not the first, but the third that had been made, all for the convenience of defense counsel; no competent proof was proffered showing how much notice the Appellant had that Mr. Louisell would be unavailable; no acceptable documentation of the reasons for the delay was profferred until over three months after the trial; the delay would work a very considerable inconvenience upon the court. In addition, we do not lose sight of the fact that the real issue here is whether Messrs. Barris and Fink properly and competently represented the Appellant. Williams v. United States, 332 F.2d 36, 39 (7th Cir. 1964), cert. denied, 379 U.S. 976, 85 S. Ct. 672, 13 L.Ed2d 566. The trial judge, who witnessed the entire proceeding, and was in a favorable position to judge this aspect of the case, stated:

> "The instant blackjack case was tried for the defendant by Ivan Barris, assisted by Neil Fink. Mr. Barris is a member of the law firm Louisell and Barris. Mr. Fink is an associate, employed full time by the firm. Mr. Barris is a highly experienced and skillful trial lawyer. He is one of the outstanding members of the Michigan bar. If he is surpassed in ability by any trial lawyer, this observer has not met him. Neil Fink's experience is limited. However, he is licensed to practice and is a phenomenally gifted trial lawyer with skills which are astounding in view of his limited experience. Apart from the pretrial motions, in

connection with which the defendant makes no claim of deprivation of counsel, the blackjack case was a simple one. Trial lasted only one day. The case was brilliantly and skillfully tried for the defendant by Barris and Fink. The defendant was more than adequately represented by them. For all his skill, Mr. Louisell could have done no better. The defendant was not prejudiced by Mr. Louisell's failure to appear."

The Appellant had a fair trial. Due processes requires no more.

[6] The Appellant's contention that the District Court erred in refusing to grant an evidentiary hearing on this issue is without merit. 28 U.S.C. § 2254(d) (1964).

II.

The Appellant contends that the blackjack which was introduced against him in his state prosecution was obtained as a result of a search conducted in violation of his Fourth and Fourteenth Amendment rights.

The following statement of the facts is derived from the record, the factual findings and the memorandum of the state trial court. The court's findings of fact on the issues of the lawfulness of Appellant's arrest and a search of his home were based upon a six-day hearing on a motion to suppress evidence. There is no indication that the "fact finding procedure employed by the state court was not adequate to afford a full and fair hearing" or that the Appellant "did not receive a full, fair and adequate hearing" with an opportunity to fully develop all of the "material facts." 28 U.S.C. § 2254, as amended in 1966. The Appellant was permitted to call any witnesses with relevant information and he was allowed broad latitude in cross-examination. The testimony brought forth at the

hearing on the motion to suppress evidence fully reflected all of the revelant available evidence which Appellant's counsel chose to present.

[7, 8] Indeed, the only claim which Appellant lodges against any of the procedures used throughout the fact finding process is that the state trial court judge was prejudiced against him. As the District Court found after thoroughly reviewing the record, there is no merit in this vague claim. We conclude that the findings of fact made by the trial judge have been "reliably found." Under these circumstances, we must defer to his factual findings, which are "presumed to be correct." 28 U.S.C. § 2254 (as amended, 1966); Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1963).

On May 13, 1968, the Michigan State police secured a warrant for the arrest of the Appellant and thirteen other persons for conspiracy to commit extortion. The arrest warrant, which is stipulated to be valid on its face, was procured after a preliminary examination before a magistrate. The proofs before the magistrate established that the Michigan State police, the Chief Investigator of the Attorney General's office and Detroit police had been carrying on an investigation of an alleged conspiracy to extort and there was probable cause to believe that the Appellant was a participant in this conspiracy.

After a conference of the Federal Building in Detroit, a task force consisting of four agents of the Federal Internal Revenue Service, two Sterling Heights police officers, two Detroit police officers and one State police officer, Sergeant Mull, who was in charge of the task force, appeared at Appellant's residence at 6:00 a.m. on May 14, 1968. The size of the arresting party may be explained in part by the fact that on a prior occasion an officer was as-

saulted while lawfully in the environs of the Appellant's home. The composition of the arresting party, including members of the Intelligence Division of the Internal Revenue Service, suggests that contemporaneous with the lawful arrest of the Appellant, it was the intention of some of the arresting officers to conduct a search for evidence incident to the arrest of Appellant. The scope of their intended search and their intentions with regard to the arrest are not relevant to the instant case because the blackjack which was seized was not discovered as a result of any general exploratory search, as will be shown later.

The Appellant met Sergeant Mull and four arresting officers at the front door. The other officers had surrounded the house to prevent escape. One officer saw an unidentified person quickly open and close the back door before the Appellant opened the front door of his house. When he answered the door, Appellant was clothed in a pair of "shorty pajamas," bedroom slippers and a robe, and a prosthesis was attached to his leg. In the front foyer of the house, just inside the door, Sergeant Mull announced to the Appellant that he was under arrest for conspiracy to extort, quickly searched the person of Appellant and started to read the arrest warrant.

The Appellant announced he was ready to go. Sergeant Mull responded, "Well, can we go into another room, where I want to read the rest of this material [arrest warrant and *Miranda* warning] to you" and words to the effect "Well, you don't want to go [before a magistrate in court] like that, and the way you're dressed, in shorty pajamas and a robe." Sergeant Mull then walked with the Appellant from the front foyer into the dining room where the light was better for reading. Sergeant Mull completed the reading of the arrest warrant and gave Appellant a

Miranda warning. Thereafter, Appellant read the arrest warrant to himself and stated he was "ready to go."

In response, Sergeant Mull suggested that it would be well for the Appellant to change from bed clothes to street clothes before leaving for the station and for his arraignment on the warrant before the Grosse Pointe Municipal Court. In the words of the trial court, "Vito Giacalone willingly accepted the suggestion." In reference to the possible coercive effect of Sergeant Mull's suggestion, the trial court found as follows:

> "Vito Giacalone was dressed in short pajamas and a robe. He had a prosthesis on his right leg. He was about to go to a court of law. The Court finds that Mull's suggestion that Vito Giacalone change from bed clothes to street clothes was perfectly reasonable and proper; that it was a suggestion, not a directive or an order; that Vito Giacalone readily accepted it without any sense of duress or compulsion; that Mull's suggestion was made in good faith, without hidden or ulterior motive; and finally that Mull's suggestion about the defendant's attire was made without the intention or purpose of enabling the police to search the bedroom or any other area. This finding is corroborated by the fact that the officers upon entering the defendant's bedroom did not immediately begin to search it, as will be seen.

Immediately after this exchange, the Appellant, Sergeant Mull and three or four officers went up the stairway and into the Appellant's bedroom so he could get dressed. Upon entering the bedroom, the trial court found that

> By word, gesture and overt act, the defendant [Appellant] showed that he wanted and intended to get

clothes out of a chest of drawers in his bedroom. It was only after the defendant manifested such intention that Lieutenant Oakes said, "Wait a minute," in order to search the chest of drawers for possible weapon. He searched the drawers in the chest. Immediately he found a small arsenal. In the top drawer he found a blackjack or slapjack and two .38 caliber six-shot revolvers, both loaded. In another drawer of the chest he found a third .38 caliber six-shot revolver. He found a fourth .38 caliber five-shot revolver in the same chest of drawers, and also in that chest of drawers a single-shot Derringer. Five handguns altogether were taken from the chest of drawers, at least two of which were loaded and ready to be fired.

[9] The course of events from the arrival of the arresting party, the arrest by Sergeant Mull, the reading of the warrant, the giving of the *Miranda* warnings, the conversation about the appearance of Appellant in bed clothes before a court, and the repairing of the Appellant to his bedroom, where the blackjack was discovered in a drawer into which the Appellant was about to reach—all of these events form one single continuous flow of action which was the natural consequence of the arrest at 6:30 a.m. of a person at his home and in his bed clothes.

It is significant to note that the conversation of Appellant and Sergeant Mull and the ensuing search which resulted in the discovery of the blackjack were largely unrelated to the more widespread search of the members of the arresting party at, during and after the arrest.

Based on these facts the District Court denied Appellant's petition for habeas corpus. In so doing, the District Court held that Appellant's arrest was made in good faith and upon probable cause and not used as a subterfuge or

pretext to make an otherwise impermissible search, Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958); United States v. James, 378 F.2d 88 (6th Cir. 1967); and further, it held that the search which uncovered the blackjack was a reasonable search incident to Appellant's arrest, and that—insofar as the discovery of the blackjack was concerned—the search was not that of a general exploratory expedition. We agree:

We do not dispute Appellant's contention that an arrest may not be used as a mere subterfuge by law enforcement to gain otherwise impermissible access to a person's house, papers and possession. Jones v. United States, *supra;* United States v. James, *supra.* In both *Jones* and *James,* the primary purpose of the arresting law enforcement officials was in making a warrantless, general exploratory search of the arrestee's possessions. And in both *Jones* and *James,* the arresting law enforcement officials were not engaging in a "good faith" arrest of the accused. As the United States Supreme Court stated in Jones v. United States:

> "The testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search [the premises] * * * not to arrest petitioner."

The rationale of the *Jones* and *James* cases is inapplicable to the instant case. The facts produced at the hearings in the trial court unquestionably support the conclusion that the arrest of the Appellant was based on probable cause, was in "good faith," and was not used as a mere pretext to engage in an otherwise unlawful warrantless search. The extensive investigation of law enforcement officials prior to the arrest, the evidence adduced by state police to a magistrate before the arrest warrant issued, and the diligent attempts by Michigan law enforce-

ment officials to convict the Appellant on the charge for which he was arrested are ample evidence that the arrest of Appellant was not a mere subterfuge to justify an incidental search.

[10] It is true, of course, that contemporaneous with the lawful arrest of the Appellant it was the intent of at least some of the law enforcement officers involved to engage in a rather general search of Appellant's house after Appellant had been arrested and their safety had been assured. The desire of an arresting officer to initiate a search incident to a lawful "good faith" arrest does not convert that lawful arrest into an unlawful subterfuge to conduct an impermissible search. In arrests prior to Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), which is not to be applied retroactively, *see*, Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971), it was not unusual for arresting police to have an intent contemporaneous with a lawful arrest to search the arrestee's home, possessions, and papers for evidence of the purported crime or related crimes of the arrestee. Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971); United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950); Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed 1399 (1947). Applying the principles of *Hill*, *Rabinowitz*, and *Harris* —each of which involves thorough searches of an entire office or apartment—we may conclude that prior to Chimel v. California, *supra*, a search did not become unlawful because contemporaneous with a good faith arrest based upon probable cause, the arresting officer also intended to search for evidence of the arrestee's alleged crimes. *See* Williams v. United States, *supra*.

The Appellant also contends that even if his arrest was lawful, that the ensuing search which revealed the black-

jack was an unreasonable general exploratory search. We do not agree.

[11] We need not concern ourselves with the activities of each of the officers in the arresting party. The only evidence sought to be introduced in this case is the blackjack discovered by law enforcement authorities after the Appellant had been arrested and informed of his rights and as by word, gesture, and overt act, the Appellant manifested an intention of reaching into a drawer in his bedroom bureau which contained the blackjack and other lethal weapons. There is sufficient evidence to support the determination of every court which has reviewed the evidence that Appellant's decision to walk from the dining room to his bedroom in order to change into more appropriate clothing was voluntary and consensual. Certainly, if immediately after a lawful arrest, the arrestee reads the arrest warrant and without coercion consents to go to his bedroom to change into more appropriate clothing, the arresting officers—incident to that arrest—may search the areas upon which the arrestee focuses his attention and are within his reach to gain access to a weapon or to destroy evidence.

The principle that law enforcement officials to protect their own safety may search the area within the immediate control of a person whom they have arrested has never been seriously challenged. *See* Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1967); Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed 145 (1925). And in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the United States Supreme Court affirmed the continuing validity of this principle when it observed:

> "A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting

> officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763, 89 S.Ct. at 2040.

Applying these principles, the arrest of Appellant was lawful and the decision of the Appellant to enter his bedroom was reasonably close to the time and place of arrest and pursuant to a reasonable lawful purpose of changing out of one's bed clothes before leaving. The discovery of the blackjack in the bedroom was the result of a search directed by the arresting officer of the area within the intended reach of the arrestee. Under such circumstances, the discovery of the blackjack was reasonably incident to the Appellant's arrest.

It was not necessary to explore the lawfulness of the search as it relates to any other items which were seized, nor is it necessary to speculate on the lawfulness of the search had the arrestee been compelled to enter his bedroom at the direction of law enforcement officials.

We have considered the remaining issues raised by Appellant and find them without merit.

The decision of the District Court denying Appellant's petition for habeas corpus is hereby affirmed.

APPENDIX A

OPINION ON MOTION FOR EVIDENTIARY HEARING

(Circuit Court—County of Wayne)

(Filed February 11, 1969)

(People v. Vito Giacalone)

On or about November 7, 1968, a short continuance of the blackjack trial was granted until November 14 to enable Mr. Louisell to enter the hospital for diagnostic tests on his assurance that he would be present for trial on the adjourned date.

On the morning of November 12, defense counsel made an oral motion to continue the blackjack trial indefinitely until Mr. Louisell would be available to try the case. In support of the motion it was alleged orally that Mr. Louisell could not leave the hospital. No affidavit or sworn testimony accompanied this motion. The motion was denied.

Later in the day, on November 12, defense counsel made an oral motion for rescission of the change of venue. The principal ground was that Mr. Louisell would not be available to try the case and Mr. Fink was uneasy about empathy between himself and a St. Joseph County jury. There was no affidavit or sworn testimony submitted regarding Mr. Louisell's unavailability. The motion for rescission of the change of venue was denied.

On November 14, defense counsel made it clear that the Court was proceeding to trial contrary to the defendant's preference that Mr. Louisell should be present as defense

counsel. This was a renewal of the position earlier taken by the defendant on November 12. On November 14 again it was made to appear by defense counsel that Mr. Louisell was confined to the hospital, and there was in effect another request for a continuance on this ground, among others. This was likewise an oral request. Like the prior oral request for adjournment, this request was unaccompanied by supporting affidavit or sworn testimony regarding Mr. Louisell's unavailability. On November 14, Ivan Barris, one of the defendant's attorneys, sought to reserve the right to supplement the record. The remarks of the Court clearly encouraged the filing of a motion to supplement the record. However, no such motion to supplement accompanied the next pleading or court appearance.

On November 15, 1968, there was a post conviction hearing on bond. No sworn evidence was presented or offered regarding Mr. Louisell's hospitalization, nor was there any motion, written or oral, to supplement the record in connection with Mr. Louisell's hospitalization.

On or about November 29, 1968, a written motion for new trial was filed. In this motion, one of the grounds urged by defendant was that he was unconstitutionally deprived of the right to counsel and unconstitutionally denied due process of law in that he was forced to trial while counsel of his choice was unavailable. No affidavit was filed and no sworn testimony was proffered regarding Mr. Louisell's unavailability in support of the motion for new trial. Nor was the motion for new trial accompanied by a motion to supplement the record regarding Mr. Louisell's hospitalization.

On December 5, the defendant was sentenced. At the sentencing hearing, no affidavits regarding Mr. Louisell's hospitalization were filed and no proofs on this subject

were presented or proffered, nor was a motion filed, either orally or in writing, requesting a supplementation of the record respecting Mr. Louisell's hospitalization.

On December 6, oral argument was heard on the motion for new trial. In the course of oral argument, neither affidavits nor sworn testimony were presented or proffered concerning Mr. Louisell's hospitalization. Nor did the defendant orally or in writing move for an opportunity to supplement the record in this regard. Indeed, Mr. Louisell said

> "* * * on reading the transcript of the proceedings at Centreville, I notice that you told Mr. Barris that Mr. Barris might, or I might, be accorded an opportunity to supplement the record with respect to my hospitalization.
>
> "I don't think at this posture that it is a matter with which we are germanely concerned on the motion for new trial."

Thereafter Mr. Louisell went on to make certain unsworn pronouncements concerning his hospitalization which tended to confirm this Court's belief that his hospitalization was an elective, non-emergency visit for diagnostic tests for his own convenience, and not for the purpose of treating any disabling illness.

In the course of oral argument on the motion for new trial, the Court made it clear that evidence was lacking of Mr. Louisell's availability. The Court said,

> "If a man wants to be excused from trial because of illness, he ought to present some solid testimony, or an affidavit at least."

To Mr. Louisell's unsworn argument that he remained in the hospital beyond November 14 on the insistence of four physicians, the Court replied,

> "Well, that may have been your choice. There was no court order keeping you in that hospital."

The Court's skepticism is further demonstrated in the following reply to Mr. Louisell's argument that he had an obligation to his family, to his children, as well as to the Court:

> "The Court: That obligation didn't keep you from being out actively practicing law on the 18th day of November."

Further the Court said:

> "Well, as I see it, you did not make any adequate predicate for a continuance. * * * As I see it, you were expected to try a case on behalf of your client on November 14, and for your own convenience did not."

Despite the clear manifestation by the Court on December 6 that Mr. Louisell's incapacity was not established to the Court's satisfaction, at the next opportune moment no affidavits were filed and no sworn testimony presented or proffered regarding Mr. Louisell's hospitalization.

The next opportune moment came on or about December 9, 1968, when a supplement to the motion for a new trial was filed. No affidavit concerning Mr. Louisell's hospitalization accompanied the supplement to the motion for new trial. Nor was there any sworn testimony presented or proffered at the hearing upon the supplement to the motion for a new trial which took place on December 13, 1968.

Only after long and arduous toil by the Court in research, in studying authorities, in arriving at a decision on the motion for a new trial, and in reducing the decision to writing, did the defendant seek to supplement the record concerning Mr. Louisell's hospitalization. One can only conclude that the defendant and defense counsel speculated upon the outcome of the motion for a new trial, and only after it was adversely decided did they seek an evidentiary hearing respecting Mr. Louisell's hospitalization.

General Court Rule 503 deals with continuances. Subsection 1 is as follows:

> "1. Policy. It is the policy of this rule to encourage the diligent preparation and trial of cases. Continuance for any cause shall not be granted unless a showing is made and the court finds that the grounds for continuance do not arise out of the fault or negligence of the moving party and the court finds that substantial justice more nearly will be obtained."

The local Wayne Circuit Court rule applicable to postponements in criminal cases provides:

> "No trial of a criminal case shall be adjourned except by the Presiding Judge for good cause shown upon written motion of the party seeking the adjournment."

Neither the spirit nor the letter of these rules was complied with by the defendant. A "showing" of "grounds" for continuance was not made as required under Rule 503; nor was a timely motion in writing filed before the Presiding Judge as required by Rule 31, Part B, Subparagraph 9 of the local court rule.

Apart from these rules, and even if we regard them as directory rather than mandatory, this motion for evidentiary hearing comes too late.

The proper time for proof of Mr. Louisell's disability was on November 12 when the motion for continuance was first made. Perhaps such proofs would not have been too late if offered when court opened in Centreville on the 14th day of November. Such proofs were not proffered nor the point preserved in the hearing on bond on November 15. Such proofs were not proffered nor was the point preserved at the time of the sentence hearing. Certainly such proofs should have been proffered not later than the date of filing of the motion for new trial on November 29. Extending great charity to the defendant, perhaps it would not have been an abuse of the trial judge's discretion to have considered sworn proofs if proffered by December 6, December 9, or December 13. The last date is the date of oral argument on the supplement to the motion for new trial. It is the date on which motion for new trial was submitted to the Court for disposition.

Up to this very moment, there has been no showing that in the exercise of reasonable diligence, sworn proof could not have been offered on or before the trial on November 14. A fortiori there has been no showing that sworn proof could not, in the exercise of reasonable diligence, have been submitted in connection with the motion for new trial and supplement thereto.

"To everything there is a season, and a time to every purpose under the heaven."[1] On November 12, the timely moment for a showing under oath, the trees were not yet altogether barren of autumn leaves. The leaves have long since gone. Indeed, the first snows had fallen by the time the motion for new trial was filed. The winter solstice has come and gone. Only now we are told, after a decision

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[1] Ecclesiastes, Ch. 3, v. 2.

adverse to the defendant on a motion for new trial, that an evidentiary hearing is sought to supplement the record regarding Mr. Louisell's hospitalization. And parenthetically still there are no physician's affidavits accompanying this motion.

If a modicum of order is to be preserved in the proceedings of trial courts, points must be urged with evidence in support of the relevant timely moment. The time for evidentiary support of the oral petition for continuance was before trial. The time for evidentiary support of the assertion of the right to chosen counsel was likewise before trial. Or if this could not be done in the exercise of reasonable diligence, the time for sworn support of the request for continuance and the time for sworn support of assertion of the right to chosen counsel was as soon after trial as reasonable diligence permitted. Now a jury trial has been completed. Much human effort, much expense, much inconvenience, much tribulation attended that trial. There followed two post conviction hearings, and after such hearings there followed a motion for new trial, filed and argued in two steps. At none of these stages in the proceedings were sworn proofs presented or tendered. At none of these acts in the drama was there an oral or written application for an opportunity to supplement the record regarding Mr. Louisell's hospitalization.

Much human effort and anguish of decision attended the disposition of the motion for new trial. True, the decision on motion for new trial considered the possibility of genuine physical incapacity or disability on the part of lead counsel and held that even such disability would not warrant the continuance sought (since the delay sought was unreasonably long and uncertain in duration). However, the disposition of the motion unquestionably relied heavily on the absence of competent evidence of disability. At

the very latest, such evidence should have been submitted before the motion for new trial was placed in the Court's hands for decision, particularly in view of the skepticism expressed by the Court during oral argument of the motion on December 6.

There is such a thing in the law as simply being too late. The instant motion is just that. If courts do not require timely presentation of issues, our system of criminal justice will be beset with delay, disorder, and disarray. If courts do not require timely presentation of issues, wasted time and effort will be built into the administration of criminal justice, along with one more loophole for loophole-seekers.

There is a season for everything, and everything in season. The season for a motion such as this one is long since past. In season, this judicial drama has had a tremendous amount of time and attention. The Court must in fairness to other litigants be heedful of other cases, about 1300 in number, which are this Court's individual responsibility. The motion for continuance must be tested by the showing which accompanied the motion. The motion for new trial must be tested by the showing which accompanied that motion. It would be a misallocation of judicial time to hear stale evidence which can no longer properly affect the Court's judgment. To do this, with approximately 1300 other cases awaiting hearing, some for over three years, would be most unfair to other litigants. Vito Giacalone has had more than his fair share of judicial attention. It is time for the trial court curtain to drop on this judicial drama. It is time for the Court's attention to be directed to other litigation. For these reasons the motion is denied.

Dated this 11th day of February, 1969.

Victor J. Baum
Circuit Judge

McCREE, Circuit Judge (dissenting).

I do not believe the majority correctly states the law applicable to either issue.

To determine whether the trial court abused its discretion in denying appellant a continuance, the majority would balance appellant's "right to adequate representation of counsel at trial, and the public interest in the prompt and efficient administration of justice." This approach is inconsistent with our decision in United States v. Johnston, 318 F.2d 288 (6th Cir.1963), in which we held that the Sixth Amendment requires that a defendant who is informed shortly before trial that counsel of his choice will not be available to represent him, must be afforded a "fair opportunity and reasonable time to employ counsel of his own choosing." *Id.* at 291. We held that a period from Friday to the following Tuesday, the day of trial, "was not a reasonably sufficient time to give appellant fair opportunity to select and employ counsel of his own choosing," and we also stated: "[a]ctually it seems to us that appellant was not prejudiced by the action of the District Judge in this respect but this situation does not satisfy appellant['s] rights under the Sixth Amendment [citations omitted]." *Id.* at 291.

The majority's attempts to distinguish *Johnston* are unconvincing. It is argued that Balk (the successful appellant in *Johnston)* personally asserted his desire to obtain an attorney other than his chosen attorney's associate; whereas, in this case the defendant personally did neither. However, this states a distinction which makes no substantial difference. It appears that appellant was not informed this his attorney would not be present at trial on November 14 until two or three days before that date. When so informed, he first attempted through Mr. Fink,

Mr. Louisell's relatively inexperienced associate, to obtain a continuance until Louisell could be present, and that effort consumed an additional day until late in the afternoon on November 12. The task of obtaining substitute counsel willing to enter a criminal case on November 12 or 13 to be tried at 8:30 a.m. on November 14 in Centreville, Michigan, easily surpasses the difficulty faced by Mr. Balk in his case. It would seem unnecessary to require appellant to object to proceeding with Mr. Fink as his attorney, when Fink himself stated to the court in appellant's presence:

> I find it much more favorable from my standpoint * * * to try the case in Wayne County.
>
> I don't know that I have any rapport with a non-urban jury * * *. [I]n fact, I have never been out of the city * * *. If I am going to represent a man on a 5-year felony charge, I want it to be a place where I'm used to and where I will feel most comfortable.
>
> * * * * * *
>
> Here you have, your Honor, a man stipulating on the record that he wants to stay in Wayne County, the place of his home vicinage. In any event, at the time the motion was made for a change of venue, it was contemplated then that Mr. Louisell would try the case. At this particular posture it has become obvious that I am going to try this case for Mr. Giacalone upon the Court's order. If I am asking to stay in Wayne County, Mr. Giacalone is asking to stay in Wayne County, why should we all go up to Centreville? * * *
>
> I don't feel competent to try a trial in Centreville and I mean that sincerely. I wouldn't know what questions to ask on voir dire.

The decision in *Johnston* does not turn upon Balk's unsuccesful attempt to obtain substitute counsel on short notice. In fact his chosen attorney was unavailable because he elected to use the day set for trial to prepare an argument to be presented to the Michigan Supreme Court. A continuance most likely would have resulted in the availability of Balk's original attorney of choice. That is what appellant sought here, but he was given neither that consideration nor a reasonable time to obtain acceptable alternative counsel.[1]

It is further asserted that the continuance sought would have been too long, perhaps four months, because of other foreseeable obstacles to Mr. Louisell's participation in this case. The first answer to this argument is that a four month delay to permit representation by an attorney of his choice does not seem inordinate when a man who had only one misdemeanor conviction was faced with the possibility of five years of imprisonment.

Second, the assertion that appellant had previously been granted two continuances is simply not supported by the record. On September 30, 1968, appellant admittedly requested an adjournment of the scheduled October 8 trial to October 21, in order to provide time for hearings and arguments on preliminary motions. However, during proceedings in the District Court, appellant asserted without contradiction that the case had been adjourned until October 21 pursuant to an October 4 request by the prosecution. The case was thereafter diligently pursued, and

[1] On November 13, Mr. Ivan Barris, Mr. Louisell's partner, settled a case which had theretofore precluded his participatin in the blackjack trial, and he appeared to represent appellant on November 14. At that time he asserted appellant's rejection of both himself and Mr. Fink as trial counsel.

following disposition of preliminary motions, the trial date was set in consideration of counsel's long-standing appointment to enter a hospital on November 10 for sophisticated cardiovascular diagnostic tests.

Further, the trial judge was not limited to a choice between immediate trial or a four month delay. He might have delayed the trial a few days to permit appellant to obtain acceptable substitute counsel. Here, only 40 hours elapsed between the time when the court denied a continuance until trial, and most of this time was outside of normal business hours. This is less time than that held inadequate for securing other counsel in *Johnston*. Since it appears that the State's case was based entirely upon the testimony of police officers who searched appellant's home, the potential inconvenience to witnesses from delay in this case was minor compared to that in *Johnston*. *Id.* at 290.

In stating that the real issue is whether appellant had competent counsel and was properly represented, the majority would overrule, *sub silentio*, our decision in *Johnston*. As authority for this decision, they cite Williams v. United States, 332 F.2d 36 (7th Cir. 1964), cert. denied, 379 U.S. 976, 85 S.Ct. 672, 13 L.Ed2d 566 (1965). However, in that 2-1 decision, the dissenting judge pointed out that the majority rejected our *Johnston* rule. He stated, *id.* at 40, that

> [t]he denial of a continuance for his employed counsel was unfair [citation omitted], and this unfairness was aggravated by the court's forcing petitioner to trial without his employed counsel, instead of giving him further reasonable time to employ a substitute. United States v. Johnston, 318 F.2d 288 (6th Cir. 1963). This procedure was "fundamental unfairness" [citation omitted]. It is of no relevance that substi-

tute counsel has not been shown to have been incompetent or inept. United States v. Johnston, 318 F.2d 288, 291 (6th Cir. 1963). * * *

And even if it were appropriate to balance competing factors, I would not find the balance struck to be a fair one. It is difficult to imagine a case in which the witnesses would be more accessible to the prosecution, or more likely to remain so, than they were in this case.

I do not perceive the relevance of appellant's failure to offer sworn or written statements regarding Mr. Louisell's condition. Following at least two telephone conversations between the trial court and Mr. Louisell's doctors, it would seem that the situation was clear. After the initial tests, Louisell's doctors advised him to remain in the hospital a few days for additional tests. Although his life would not have been jeopardized had he failed to do so, the rescheduling of the tests at a busy medical center would have presented substantial difficulties. It therefore appeared advisable to complete the tests as the physicians advised.

The trial court listed ten reasons for his conclusion that Mr. Louisell's absence was a ruse to promote delay.[2] Six

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[2] [1] In view of the elective, non-emergency, diagnostic nature of Mr. Louisell's hospitalization—

[2] In view of his positive assurances before the brief delay was granted that he would be out, fit and able to try the blackjack case, on November 14—

[3] In view of the extraordinary skill and vigor with which Mr. Louisell was trying cases as late as Friday, November 8, the last working day immediately before he was hospitalized—

[4] In view of the fact that he left the hospital on November 16—

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of those reasons (numbers 1-6) emphasized the irrelevant fact that appellant did not assert that Mr. Louisell was physically incapable of trying the case. Two other asserted reasons (numbers 7 and 8) merely express the trial judge's frustration and suspicion. The ninth asserted reason, appellant's failure to seek substitute counsel, has been considered above. Finally, the court referred to appellant's failure to state under oath the time when he was first informed that Mr. Louisell would not be available for trial. This last factor is the only one material to the propriety of denying a continuance, but it does not appear that appellant's prior knowledge of the scheduled tests was the subject of discussion at the time the court reached its decision. Instead, the focus was upon the status of the tests and the judgments of Mr. Louisell's doctors. In this regard, after a telephone conversation involving the court, one of Mr.

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[5] In view of the great talent and energy he displayed in the trial of cases as early as November 19, soon after he left the hospital, indeed, on the second working day after the completion of the blackjack trial—

[6] In view of the absence of any sworn evidence of his disability to try the blackjack case—

[7] In view of the Court's insistence that Mr. Louisell guarantee his presence at trial as a condition for the short adjournment between gun and blackjack trials—

[8] In view of the convenient excuse for a long delay presented by Mr. Louisell's hospitalization and the marathon Rubino trial, if only the trial of the blackjack case could be avoided for a few days—

[9] In view of Mr. Giacalone's failure to seek counsel other than those in the office of Louisell and Barris—

[10] In view of the absence of sworn testimony showing the time the defendant first became aware that Mr. Louisell would not try the blackjack case—
[order and numbering supplied].

Louisell's doctors, Mr. Fink, and state counsel, the following colloquy occurred:

> Mr. Goussy: * * * the doctor saying after he came into the hospital, that he wished to keep Mr. Louisell further because of some tests that they wished to run on something that had shown up.
>
> The Court: Mr. Fink wants to supplement the record by stating that the doctor took issue with the statement by me on the telephone that Mr. Louisell's entry was elective.
>
> Mr. Goussy: I don't recall him taking issue with that, no.
>
> The Court: Well, I don't think he took issue, but I think he rather quickly described the circumstances, indicating that he, the doctor, wanted Mr. Louisell in at that time.
>
> Mr. Fink: I think that's a fair statement. I also just wanted to supplement it to this extent, that any plan to keep Mr. Louisell past the 13th was only arrived at after Mr. Louisell's entry into the hospital; and when the doctor indicated—at least, I got the inference that he had found something that had, well, worried him or opened his mind to thinking along another direction, and that he wanted to pursue that.

Since it appears that the decision to keep Mr. Louisell beyond November 13 was made after he entered the hospital on November 10, the implication of an earlier plot by appellant and his counsel was gratuitous.[3] The physicians'

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[3] I observe that the trial judge was of the opinion that appellant was a major figure in organized crime. In an opinion denying bail pending appeal the court stated:

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judgments that further tests were indicated should be enough to excuse the attorney. We should not announce a rule which requires a showing that life is endangered before counsel may obtain a continuance for medical reasons. I do not understand the trial judge to have found that a conspiracy existed between Mr. Louisell and his doctors who were specialists of international repute serving on the staff of University Hospital in Ann Arbor, Michigan, a teaching facility of the University of Michigan.

I proceed to the second issue, since granting the writ because of the denial of the opportunity to be represented

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Second, based on the investigation of the probation department and the testimony given under oath before the United States Senate Subcommittee on Investigations of the 88th Congress (testimony which, I might add, was given by honest, knowledgeable men who testified subject to the penalty of perjury) I am satisfied that Vito Giacalone is, and for virtually all of his adult life has been a participant in a large-scale organized criminal conspiracy. In reversing the refusal to allow bail pending appeal, the Michigan Court of Appeals stated:

> The moving papers state without contradiction that the defendant is 46 years of age, married and has 7 children ranging up to the age of 18 years, has a large home and has roots deeply imbedded in the community. While the defendant has frequently been arrested, his only prior conviction was in 1960 for a misdemeanor for which he was sentenced to 90 days in the Detroit House of Correction and a $300 fine.
>
> There being substantially to the appeal, we should not deny bond unless we are convinced that bail should be denied because of danger of flight, potential of harm to the community or risk to the proper administration of justice.
>
> * * * * *
>
> The crime of which defendant has been convicted is not an assaultive crime. The blackjack was not found on his person but in a dresser drawer in his bedroom. The defendant has no record of conviction for commission of assaultive crime. His reputation as an evil doer is not a relevant consideration. People v. Giacalone, 16 Mich. App. 352, 360-361, 167 N.W.2d 871, 876 (1969).

by counsel of appellant's choice would presumably result in a new trial and would leave unanswered the serious question of the validity of the search which revealed the blackjack. I conclude that the search was illegal for two reasons. First, the primary purpose of the arresting officers was to make a general exploratory search of appellant's home, and second, the search was too extensive to be upheld as incident to the arrest.

The majority opinion adopts the conclusion of the trial judge who found that "the weapons * * * were seized quite early in the law enforcement enterprise as the direct product of a lawful good faith arrest and limited search, incident thereto." This determination is supportable only by segmenting this "law enforcement enterprise" into discrete episodes—an approach which is without support in law and distorts reality.[4] This technique makes it appear that the arrest occurred in or near appellant's bedroom and that the search of the dresser drawer where the black-

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[4] The cases relied on by the trial court do not support this approach: In Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed2d 441 (1963), the Court held that an unsigned confession admitted against Wong Sun was not the "fruit" of his illegal arrest and was hence admissible; and that the illegal seizure of heroin admitted into evidence against him "invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." *Id.* at 492, 83 S.Ct. at 419. The heroin had been seized as a result of the illegal arrest of one Wong Sun's co-defendants and this issue turned on lack of standing.

In Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939), the Court reversed the affirmance of appellant's conviction, by the Court of Appeals and remanded the case to the District Court for further proceedings, therefore erroneously denied by the District Court, to determine whether evidence used against his was the "fruit" of messages intercepted by the government in violation of the Communications Act of 1934, 47 U.S.C. § 605.

In Agnello v. United States, 269 U.S. 20, 31, 46 S.Ct. 4, 70 L.Ed. 145 (1925), the Court sustained the searches of Agnello and his co-defendants, who were arrested immediately after government agents

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jack was found was simply an incident thereof. It strips of legal significance the undisputed events which preceded and followed this discovery.

The conclusion that appellant, without coercion, proceeded from the front foyer where he first admitted the officers to the upstairs bedroom where the inculpating discovery occurred illustrates the distortion which occurs from viewing the several incidents of that morning as isolated events. Without prologue, no one would impute anything but innocence to a suggestion that a man in sleepwear should put on outdoor clothing before going to the police station. However, that is not what happened here.

As the trial court found, appellant, in response to a command from Sergeant Mull, promptly answered the front door and admitted the officers. Sergeant Mull, carrying a sawed-off shotgun, and several other officers walked into the house. Mull informed appellant, who was wearing "shorty pajamas" and a robe, that he was under arrest for conspiracy to extort and quickly searched him. This took place in the front foyer of the house.

Before Mull had finished reading the warrant, Giacalone announced that he was ready to leave. Meanwhile, as

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had witnessed an illegal sale of narcotics, and the seizure of narcotics either revealed by those searches or in plain view at the scene of the arrest. However, the Court held illegal the subsequent search of Agnello's house several blocks from the scene of the arrest.

In Vanella v. United tSates, 371 F.2d 50 (9th Cir. 1966), cert. denied, 386 U.S. 920, 87 S.Ct. 883, 17 L.Ed2d 790 (1967), the court sustained a search of Vanella's residence incident to his arrest upon a warrant for conspiracy to violate narcotics laws, but held illegal the search prior to arrest of a person found in Vanella's home.

In Hayden v. Warden, 363 F.2d 647 (4th Cir. 1966), rev'd, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), the court held that evidence of only "evidential value" had been illegally seized at the time of Hayden's arrest despite the fact that the search which revealed the evidence was itself illegal.

some indication of the real purpose of the expedition, other officers, instead of limiting their search to the foyer, fanned out through the first floor and basement, ostensibly making "a quick eye inspection for persons who might hinder the arrest or assist the defendant to escape." There appears no motivation for appellant to have announced his readiness to go in his robe as he stood in the front foyer other than his desire to limit the officers' intrusion into the privacy of his home which they had no warrant to search. Nevertheless, Sergeant Mull moved into the dining room "where the light was better for reading • • • the warrant" and advised defendant of his *Miranda* rights.

Upon completion of the reading of the warrant, appellant again announced that he was prepared to go to the station. Again Sergeant Mull deferred their departure and suggested that appellant change to street clothes. Appellant contended that Sergeant Mull ordered him to change clothes and that Mull had already stated that there was to be a search of appellant's bedroom. One of the arresting officers also testified that Mull announced then that he intended to conduct a search. Nevertheless, the trial court found that Mull's suggestion was " • • • not a directive or an order; that Vito Giacalone readily accepted it without any sense of duress or compulsion; [and] that Mull's suggestion was made in good faith, without hidden or ulterior motive • • •."[5]

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[5] I observe that Sergeant Mull's testimony on cross-examination was demonstrably inaccurate in some respects:

> Q. Well, in any event you have acknowledged that you made one call, phone call to Lieutenant Schwartzendruber?
>
> A. Yes, sir.
>
> Q. And you told Lieutenant Schwartzendruber did you not, "We can't bring him in yet because we're not through with the search"?
>
> A. No, sir.

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The conclusion that appellant accepted the suggestion voluntarily is unsupportable, and it should be rejected. It is inconsistent with appellant's two previous announcements that he was prepared to leave. As the Supreme Court stated in Townsend v. Sain, 372 U.S. 293, 316, 83 S.Ct. 745, 758, 9 L.Ed.2d 770 (1963):

> This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. [Citations omitted]. Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. [Citations omitted].

(Continued from preceding page)

Q. You say you didn't?

A. That's right.

Q. Do you remember—so we don't have any misunderstanding Mr. Mull, I am asking you if it is not a fact that you told Lieutenant Schwartzendruber when you called him that you couldn't bring him in yet because you hadn't completed the search.

A. Not that I recall.

Q. Do you remember being asked this question and your giving this answer, page 62 of the preliminary examination?

"Q. You called him (referring to Schwartzendruber), to tell him that you were—you would be bringing Mr. Giacalone in?"

And the answer: "Yes."

Q. That you hadn't completed the search yet?

And your answer: "Yes, sir."

* * * Is it your testimony then that you were searching the upstairs of the house, not Mr. Giacalone's bedroom for weapons?

A. And other persons.

Q. And other persons?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. Well, first of all let's talk about the weapons. Page 75 of the preliminary examination.

Q. Now were you looking in these bedrooms for guns? And the answer: No."

Also, acquiescence to the "suggestion" of a policeman armed with a sawed-off shotgun, wearing a sidearm and commanding a posse of eight officers can hardly be viewed as volitional. *See* Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); Bumper v. North Carolina, 391 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). Under these circumstances, we can appropriately reach our own conclusion regarding the coerciveness of Mull's suggestion. As the Supreme Court stated in Brown v. Allen, 344 U.S. 443, 507, 73 S.Ct. 397, 446, 97 L.Ed. 469 (1953) (opinion of Mr. Justice Frankfurter speaking for a majority of the Court):

> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, [citation omitted] the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.
>
> For instance, the question whether established primary facts underlying a confession prove that the confession was coerced or voluntary cannot rest on the State decision. [Citations omitted].

See *Townsend v. Sain, supra,* 372 U.S. at 309 n. 6, 83 S. Ct. 745. *A fortiori* in this case, where the trial court's conclusions are predicated upon a legally erroneous piecemeal view of the activities of the search party they should not be considered binding.

A segmented view of events and an unrealistic concept of consent would justify the search of virtually all of appellant's home. During the course of the search appellant

was led into each of the three or four other upstairs bedrooms. He was then conducted to the kitchen, to the family room, and to the basement where he was required to open locked doors for the searchers. Several of the officers testified that appellant requested that he be allowed to accompany them on their search because he didn't want his house torn up. One officer recalled the statement as follows: " * * * Mr. Giacalone, if my memory is correct, said that, 'Go ahead and search, but don't tear the house up like you did the last time.' " There is no more tenable basis for considering the search of appellant's bedroom separately than there is for separately considering the search of each room in appellant's house.

My conclusion that the search was all one is further strengthened by the fact that the officers' primary purpose in arresting Giacalone was to conduct a search of his home. And the latter fact is itself enough to invalidate the search. United States v. James, 378 F.2d 88 (6th Cir.1967); United States v. Harris, 321 F.2d 739 (6th Cir.1963).

The trial judge characterized the activities of the Internal Revenue Service and Sterling Heights Police components of the arresting expedition as follows:

> Despite their uncontroverted protestations in the record to the contrary, I believe on the basis of circumstantial evidence that the IRS had some objective other than the mere reduction of Vito Giacalone to state police custody. Similarly contrary to the undisputed testimony of the Sterling Heights police officers, but on the basis of inferences arising from the evidence, I believe that they had some goal or purpose in addition to the mere arrest of Vito Giacalone on the extortion conspiracy warrant.

He also found that:

> * * * It had been agreed from the start that any tangible evidence would be turned over to Mull. * * * Mull was in charge throughout.

Events subsequent to the discovery of the blackjack further impugn the motives of the arresting officers. As the trial judge found:

> From the information which the officer[s] had prior to this arrest, they were aware of a safe concealed under the bedroom closet floor. They pulled up some loose floorboards to gain access. Upon the request of the officers, the defendant opened the safe. The officer inspected its content.

About an hour was spent in appellant's bedroom.

> The search in the bedroom was followed by a thorough, systematic far-ranging search of the house which lasted about an hour or more. Every room received at least a quick eye inspection. Certain rooms were gone over thoroughly and meticulously by expert searchers.
>
> The officers testified that in their extensive search they were looking for concealed respondents named in 14-man warrant, for means and instrumentalities of the extortion and conspiracy, for evidence of the conspiracy, and for offensive weapons. Regarding the quest which followed the bedroom investigation, the officers were rather hard put to describe any particular instrumentality or piece of evidence for which they were searching.

* * * * * *

> As a part of the extensive search and investigation, about a dozen color photographs were made by Sergeant Mull in various rooms of the house. He also answered several telephone calls while search was being made * * *.
>
> * * * * * *
>
> To be sure, in terms of numbers, the chief law enforcement agency in the arrest crew, with its four special agents, was the Internal Revenue Service of the United States. True also that upon the evidence in this record, IRS had nothing to do with the investigation of the extortion conspiracy. Admittedly, there were also two officers from the Sterling Heights Police Department in the arrest crew, although that Police Department was not directly concerned with the extortion conspiracy investigation. Further, it must be conceded that the most active searchers in the home were from the Sterling Heights police force and the Internal Revenue Service.

It thus appears inescapable that the officers intended from the beginning to conduct and did conduct a general exploratory search. Although, as the trial judge found, the arrest warrant was obtained in good faith, the selection o fthe time and place of its execution and the manner of its execution make it abundantly clear that the search was the primary purpose of the officers' visit to appellant's home. *See* United States v. James, *supra;* United States v. Harris, *supra.*

But even if the primary purpose of the officers was not to conduct a search but to effect the arrest, the search exceeded constitutionally permissible bounds. As Judge Learned Hand stated in United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926):

> After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home.

I agree that the standards enunciated by the Supreme Court in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), reh. denied, 396 U.S. 869, 90 S.Ct. 36, 24 L.Ed.2d 124 (1969), are not applicable to this case. Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971). But there is no need to repeat here the thorough analysis, made by Court in *Chimel,* of the development of the law of searches and seizures incident to arrests. The Supreme Court has never approved as incident to an arrest a search as extensive as that conducted in this case.[6] *See generally* Coolidge v. New Hampshire, 402 U.S. . . . , 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in which Mr. Justice Stewart stated, at . . . , 91 S.Ct. at 2033:

> [T]his Court has repeatedly held that, even under [United States v.] Rabinowitz [339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950,)] "[a] search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.' * * * " (Emphasis in original) [Citations omitted.]

---

[6] I am aware of no Supreme Court decision which has upheld, as incident to an arrest, a pre-*Chimel* search on a floor different from that on which the arrest was made.

The most extensive search approved by the Court occurred in Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947), overruled, 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed.2d 685 (1969). *See also* Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971). In *Harris,* the searchers spent five hours searching a four-room apartment, located on a single floor, and seized an envelope containing several draft cards illegally possessed by Harris. In upholding the search, the Court reaffirmed the principle that, "[e]ach case is to be decided on its own facts and circumstances [citations omitted]." 331 U.S. at 150, 67 S.Ct. at 1101. *See also* Rochin v. California, 342 U.S. 165, 72 S. Ct. 2095, 96 L.Ed. 183 (1952). And the difficulty of determining in each case whether a search is unlawful under the uncertain standards applied by the majority in *Harris* was stressed by Mr. Justice Jackson in his dissent. 331 U.S. at 197, 67 S.Ct. 1098. But the Supreme Court later indicated more clearly, in Von Cleef v. New Jersey, 395 U.S. 814, 89 S.Ct. 2051, 23 L.Ed.2d 728 (1969) (per curiam), that the pre-*Chimel* line is not to be drawn significantly beyond *Harris.* In *Von Cleef* the Court held illegal, under pre-*Chimel standards,* a three hour search of a 16 room house which resulted in the seizure of several thousand articles. As the Court stated in that case:

> Even the facts of Harris v. United States, *supra*—in which the search of a four-room apartment and the seizure of an envelope containing altered Selective Service documents were sustained on the ground that they were contemporaneous with a lawful arrest—are a far cry from those of this case. • • • [W]e have no hesitation in concluding that the action of the police here in combing a three-story, 16-room house from top to bottom and carting away several thousand papers, publications, and other items cannot un-

der any view of the Fourth Amendment be justified as "incident to arrest."

395 U.S. at 816, 89 S.Ct. at 2052.

There is no convincing precedent sustaining, as incident to a valid arrest, a search of the scope and intensity of that in this case. Appellant was convicted by the use of evidence seized in violation of his Fourth Amendment rights. His reputation as a major criminal figure should not deny him the constitutional protection created for every person. The words of two former Supreme Court Justices are applicable here:

> * * * If only the fate of the [appellants] were involved, one might be brutally indiffeernt to the ways by which they get their desserts. But it is precisely because the appeal to the Fourth Amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance. Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime and criminals have few friends. The implications of such encroachment, however, reach far beyond the thief or the black-marketeer. I cannot give legal sanction to what was done in this case without accepting the implications of such a decision for the future, implications which portend serious threats against precious aspects of our traditional freedom.

Harris v. United States, 331 U.S. 145, 156-157, 67 S.Ct. 1098, 1104, 91 L.Ed. 1399 (1947) (Frankfurter, J., dissenting).

> * * * In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

I would order the issuance of the writ.

APPENDIX C

JUDGMENT

No: 20,707

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

Vito Giacalone,
Petitioner-Appellant,
v.
William Lucas, Sheriff for the
County of Wayne.

(Filed July 30, 1971)

Before: Phillips, Chief Judge and Celebrezze and McCree, Circuit Judges.

Appeal from the United States District Court for the Eastern District of Michigan.

The Cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Entered by order of the Court.

/s/ James A. Higgins
Clerk

APPENDIX D

ORDER

No. 20,707

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

Vito Giacalone,
Petitioner-Appellant,

v.

William Lucas, for the
County of Wayne,
Respondent-Appellee.

(Filed September 2, 1971)

Before: Phillips, Chief Judge, Celebrezze and McCree, Circuit Judges.

Appellant's petition for rehearing having come on to be considered, and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration in banc.

It is ordered that the petition be, and it is hereby denied.

Entered by Order of the Court.

/s/ James A. Higgins
Clerk

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No. ___

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

VITO GIACALONE,

Petitioner,

vs.

WILLIAM LUCAS, Sheriff of the County of Wayne,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTERSTATEMENT OF QUESTION PRESENTED

I

ABSENT ANY SHOWING OTHER THAN AN IPSE DIXIT STATEMENT OF DEFENSE COUNSEL THAT THE CHIEF DEFENSE COUNSEL IS HOSPITALIZED FOR NON-EMERGENCY DIAGNOSTIC TESTS, WHERE TRIAL IS FOR A DATE CERTAIN, UPON CHANGED VENUE, AFTER A PRIOR CONTINUANCE, IS THE STATE TRIAL JUDGE CONSTITUTIONALLY REQUIRED TO GRANT YET ANOTHER CONTINUANCE?

The State says "No," and the State Trial Judge, The Michigan Court of Appeals, The Federal District Judge and The United States Court of Appeals so held.

REFERENCE TO THE RECORD

Vito Giacalone, a petitioner-appellant herein, submitted a printed appendix of 623 pages, to the Court below. Where appropriate, the State will cite to that appendix as "App." followed by the appropriate page number.

No. .....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

VITO GIACALONE,

Petitioner,

vs.

WILLIAM LUCAS, Sheriff of the County of Wayne,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTERSTATEMENT OF FACTS

This is an appeal from the denial of a petition for a writ of habeas corpus. Vito Giacalone, petitioner-appellant herein, is presently serving a sentence of from 4½ to 5 years imposed in the Circuit Court of Wayne County, Michigan, following his conviction, by jury, of possession of a blackjack contrary to the applicable Michigan statute. MCLA § 750.224, MSA § 28.421.

As defined by the Supreme Court of the State of Michigan, a blackjack is:

". . . a bludgeonlike weapon consisting of a lead slug

> attached to a leather thong. The more carefully constructed blackjacks contain a spring within the handle which serves to ease the effect of the impact upon the wrist of the one who wields the weapon. The blackjack has the reputation of being a characteristic weapon of urban gangsters and rowdies."
>
> *People v. Brown* (1931), 253 Mich 537, at 542.

The weapon here involved was described in the State court proceedings as follows:

> "It is a blackjack approximately ten and a half inches long. It is flat with the hand section being possibly an inch and a quarter wide, that has a strap for the hand use. With the top or the bigger end of the blackjack being approximately two and a half inches. It has a brand name apparently of Towsom, T-o-w-s-o-m, Quality."—Testimony of Sgt. Mull, App. 504.

A timely motion to suppress was made in the State trial court. The Honorable Victor J. Baum, Circuit Judge, DENIED such motion after a hearing on the merits of the factual and legal issues. (App. 15-54).

Following conviction, the prisoner moved for a new trial. This motion was DENIED by written opinion. (App. 57-172).

The prisoner then appealed, by right, to the Court of Appeals of the State of Michigan. After a full review of the record, the Court of Appeals, in an opinion by the Honorable Louis D. McGregor, AFFIRMED the conviction. (App. 186-204); *People v. Vito Giacalone* (1970), 23 Mich App 163. The Supreme Court of the State of Michigan thereafter DENIED the prisoner's Application for Leave to Appeal. (App. 204-205); 383 Mich 786.

After thus exhausting his available State remedies, the prisoner sought a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, (App. 205). The Honorable Fred W. Kaess, United States District Judge declined to hold an evidentiary hearing, and by both opinion and order, DISMISSED the petition. (App. 235-246). Thereafter, Judge Kaess did GRANT the prisoner a Certificate of Probable Cause for appeal. (App. 247).

On Appeal, the Sixth Circuit Affirmed.

ARGUMENT

A MERE STATEMENT OF COUNSEL THAT THE CHIEF DEFENSE COUNSEL IS HOSPITALIZED FOR NON-EMERGENCY DIAGNOSTIC TESTS IS NOT A SUFFICIENT BASIS FOR A CONTINUANCE ON THE EVE OF TRIAL PARTICULARLY WHERE THE TRIAL IS SET FOR A DATE CERTAIN UPON CHANGED VENUE. THE PRACTICE AND RULES OF COURT REQUIRE SUCH APPLICATIONS TO BE UPON GOOD CAUSE SHOWN, AND, IN THE ABSENCE OF SUCH SHOWING, IT IS NOT ERROR TO DENY THE CONTINUANCE.

A.

UNDER THE FACTS HERE PRESENTED, NO GOOD CAUSE FOR A CONTINUANCE WAS SHOWN.

VITO GIACALONE, petitioner herein, asserts that there was an abuse of discretion by the State trial judge in the denial of his motion for a continuance. In support of his contention, the prisoner, relies upon *United States v. Johnson and Balk*, 318 F. 2d 288 (6 Cir. 1963), wherein the Sixth

Circuit was constrained to reverse a conviction for failure of the trial judge to grant a continuance. Coincidentally, distinguished counsel for the prisoner in this appeal was also the trial counsel who was unavailable in *Balk*.

The State of Michigan is not seeking to attack the rule stated in *Balk's* case. Indeed, we agree with the Court that under the facts of *Balk's* case, Balk was in law denied a fair trial. It is, however, the State's position that the prisoner *in this appeal*, under the facts *here presented* is treating the trial of a criminal case as though it were a game or sport in which the prisoner, under the sanction of appellate court decisions, is to be assisted by the law in unreasonably delaying trial. The State respectfully suggests that this Court disabuse him of such ideas.

Balk, we contend, is distinguishable from the appeal at bar on several distinct and rather important grounds.

First of all, in *Balk* the accused advised the Court that he "desired Mr. Louisell to try his case and, if not, that he should have more time to select a lawyer that he had confidence in." (318 F. 2d at 291). Here, the prisoner never evidenced any desire for representation by counsel other than the firm of Louisell & Barris. This whole complicated series of prosecutions (the gun case, the blackjack case, and the loan-shark conspiracy case) were handled not by Mr. Louisell personally, but by various members of the firm—including Mr. Louisell—who appeared both separately and together during various phases of the respective cases. (App. 106-108). Thus, for example, the proceedings of November 8, 1968, contain the following colloquy between Mr. Fink (Mr. Louisell's associate) and the trial judge:

> "THE COURT: Now, will there be an attorney available for Mr. Giacalone to argue those pretrial motions on the 12th?

"MR. FINK: Somebody from our office will be there.

"• • •

"THE COURT: If you're going to be here anyhow in the morning, wouldn't it be just as well to schedule a hearing on the motions for 10:30 that morning?

"MR. FINK: If we can find a lawyer in our office available. I think everybody is tied up Tuesday morning. We will just make an effort to have somebody here." (App. 542-544).

Unlike *Balk*, therefore, this is not a case where the defendant needed time to retain other counsel, but rather is a case where a continuance was desired so that more prestigious counsel would have an opportunity to appear for a party already adequately represented by other able counsel.

In *Lias v. United States*, 51 F. 2d 215 (4 Cir. 1931), aff'd. 284 US 584, the Court approved the denial of a continuance sought because of the illness of the chief counsel for the defendant. The Court noted that the defendant had been represented by two other members of the same firm. Also, see *Anno*: "Continuance of Criminal Case because of Illness or Death of Counsel," 66 ALR 2d 267, at 281-287.

Second, the continuance in *Balk* was sought for the convenience of the accused. Here, delay was sought solely for the convenience of Attorney Louisell and his doctor.

Third, the opinion in *Balk* is devoid of references to any prior adjournments. Here, two continuances (and a change of venue) had already been granted to this prisoner. (App. 133; App. 2-4).

Fourth, in *Balk's* case, this Court found *good cause shown* for a continuance on the eve of trial. Here, the State trial judge found that:

> ". . . There was no affidavit or sworn testimony submitted regarding Mr. Louisell's unavailability . . .
>
> ". . . On November 14 [trial date] it was made to appear by defense counsel that Mr. Louisell was confined to the hospital, and there was in effect another request for a continuance . . . This was likewise an oral request. Like the prior oral request for adjournment, this request was unaccompanied by supporting affidavit or sworn testimony regarding Mr. Louisell's unavailability . . . The remarks of the court clearly encouraged the filing of a motion to supplement the record. However, no such motion to supplement accompanied the next pleading or court appearance.
>
> ". . . a written motion for new trial was filed . . . No affidavit was filed and no sworn testimony was proffered regarding Mr. Louisell's unavailability . . .
>
> ". . . On December 5, the defendant was sentenced. At the sentencing hearing, no affidavits regarding Mr. Louisell's hospitalization were filed and no proofs on this subject were presented or proffered, nor was a motion filed . . .
>
> "On December 6, oral argument was heard on the motion for new trial. In the course of oral argument, neither affidavits nor sworn testimony was presented or proffered concerning Mr. Louisell's hospitalization. . . .
>
> " * * *

"Despite the clear manifestation by the Court on December 6 that Mr. Louisell's incapacity was not established to the Court's satisfaction, at the next opportune moment no affidavits were filed and no sworn testimony presented or proffered regarding Mr. Louisell's hospitalization.

"The next opportune moment came on or about December 8, 1968, when a supplement to the motion for new trial was filed. No affidavit concerning Mr. Louisell's hospitalization accompanied the supplement to the motion for new trial. Nor was there any sworn testimony presented or proffered at the hearing . . . . on December 13, 1968."

—App. 176-179

The above factual findings of the State trial judge are not clearly erroneous, but to the contrary are supported by substantial evidence. (App. 534-577). Accordingly, such findings are, by Act of Congress, "presumed to be correct." Title 28, U.S.C. § 2254(d). The prisoner has not established by "convincing evidence that the factual determination by the State court was erroneous." Title 28, U.S.C. § 2254(d).

Application of the foregoing principle to this appeal is not difficult. This prisoner and counsel were afforded numerous opportunities to submit affidavits or to proffer testimony. Indeed, the State trial judge openly invited such proofs. (App. 176-179). No evidence of any kind was submitted.

Indeed, there was an express waiver here. Counsel for the prisoner (Mr. Louisell) specifically stated:

". . . on reading the transcript of the proceedings at

> Centerville, I notice that you told Mr. Barris that Mr. Barris might, or I might, be accorded an opportunity to supplement the record with respect to my hospitalization.
>
> "I don't think at this posture that it is a matter with which we are germanely concerned on the motion for new trial." (App. 178).

The question here presented, therefore, is whether, in light of the concrete factual context of this case, the State trial judge abused his discretion in finding that no good cause had been shown for an adjournment on the eve of trial.

In *People v. Mason* (1886), 63 Mich 510, at 511, and in *People v. Smith* (1952), 334 Mich 10, at 12, the Supreme Court of the State of Michigan said:

> "A mere statement of counsel that the respondent is not prepared for trial is not sufficient basis for a continuance of the cause. The practice and rules of court require such applications to be supported by affidavit showing the necessity for delay, and, in the absence of such showing, it was not error to overrule the motion."

This philosophy is also embodied in Michigan General Court Rule 503 which provides in pertinent part:

> "... Continuance for any cause shall not be granted *unless a showing is made* and the court finds that the grounds for continuance do not arise out of the fault or negligence of the moving party and the court finds that substantial justice more nearly will be obtained." (Emphasis supplied).

Local Rule 31(b) (9) of the Circuit Court for the County of Wayne (Michigan), specifically provides:

> "9. No trial of a criminal case shall be adjourned except by the Presiding Judge *for good cause shown* upon written motion of the party seeking the adjournment."

The failure of the moving party to *show* good cause for a continuance on the alleged ground of illness of counsel is fatal to his argument. A large number of cases uphold the refusal of a continuance where the applicant failed to support his motion with sufficient supporting papers. See, *Anno*: "Continuance of Criminal Case because of Illness or Death of Counsel," 66 ALR 2d 267, at 273-279. Also, see *Anno*: Continuance: "Requirements and sufficiency of application for continuance," 4 ALR Fed at 944-946.

As was so lucidly stated by Mr. Justice White in *Ungar v. Sarafite* (1964), 376 US 575, at 589-590, 84 S Ct 841, 11 L ed 2d 921:

> "The matter of continuance is traditionally within the discretion of the trial judge. . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, *particularly in the reasons presented to the trial judge* at the time the request is denied . . ." (Emphasis supplied).

See, also *People v. Fitzgerald* (1924), 226 Mich. 402.

To recapitulate: Attorney Louisell was voluntarily in the hospital for non-emergency diagnostic tests. The trial date had been previously continued. Members of Mr. Louisell's

firm (associated with him in the defense of this series of cases) sought a continuance. No affidavits were filed nor was any testimony proffered as to the unavailability of Mr. Louisell. The trial judge clearly indicated that he wanted some evidence of the alleged unavailability. None was forthcoming. The continuance was denied. The prisoner, thereupon proceeded to trial represented by two of Mr. Louisell's very able associates.

As a matter of law, the State of Michigan contends that this prisoner cannot now claim an abuse of discretion on the denial of a continuance where the prisoner failed to show any good cause for such continuance. Under the facts as found by the State trial judge, the denial of a continuance was here proper.

CONCLUSION AND PRAYER

For the aforegoing reasons, the State contends that the conviction here assailed was not violative of any constitutional right of the prisoner.

Accordingly, the State respectfully prays that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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